

SOLVING THE *CHEVRON* PUZZLE

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I

INTRODUCTION

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,¹ the Supreme Court announced a now famous doctrine. When the federal courts review an administrative agency's interpretation of its own statute, the agency's interpretation may be set aside only if Congress has "directly spoken to the precise question at issue"² and the agency's interpretation fails to conform to congressional intent. Congress may speak to a question either by enacting clear language, or by unambiguous legislative history. If congressional intent is unclear or missing, the federal courts must defer to the administrative interpretation as long as that interpretation is reasonable.³ As has been suggested, this two-step test can be boiled down to the rule that federal courts must respect any reasonable interpretation by an administrative agency of its own statute.⁴

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1. 467 U.S. 837 (1984). *Chevron* involved a challenge to some regulations by the Environmental Protection Agency ("EPA"). The Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.) required states with overly polluted air to regulate new stationary sources of air pollution through a permit program. States were to grant permits for new, major stationary sources of air pollution only under very stringent conditions. The EPA regulations allowed states to treat entire factories as single stationary sources. If a factory, rather than each smokestack or each furnace, were to be a single source, factory managers could introduce new polluting equipment as long as overall pollution from the factory did not rise. For example, factory managers could retire old equipment that polluted at least as much as the new equipment. Under such a scenario, no permits would be required from the EPA.

The Natural Resources Defense Council obtained a reversal of the EPA regulations in the United States Court of Appeals for the District of Columbia Circuit. *Natural Resources Defense Council v. Gorsuch*, 685 F.2d 718 (1982). The court of appeals found that the EPA did not permit a factory-wide definition of stationary source. The Supreme Court reversed the court of appeals, relying upon the test explained above.

2. *Chevron*, 467 U.S. at 842.

3. The language the court used was "permissible," but commentators agree that this is to be interpreted as "reasonable." See, e.g., Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 288 (1986).

4. Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 265 n.10 (1988).

The *Chevron* decision has prompted a great deal of scholarly attention,⁵ much of which has centered on the jurisprudential and institutional appropriateness of the *Chevron* doctrine,⁶ or the tendency of the doctrine to produce political ramifications in its application in subsequent decisions.⁷ Recently, however, four articles have been published that take a somewhat different approach. A pair of articles by William Eskridge and John Ferejohn⁸ utilize formal political scientific models of the interaction between administrative agencies, Congress, the president, and the Court.⁹ Eskridge and Ferejohn argue on the basis of these models that the introduction of the administrative state has fundamentally altered the balance of power in the federal government. They

5. See, e.g., CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990); Robert A. Anthony, *Which Agency Interpretations Should Get Judicial Deference?—A Preliminary Inquiry*, 40 ADMIN. L. REV. 121 (1988); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 589 (1985); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988) (arguing that *Chevron* is a logical corollary to the courts' acceptance of extremely liberal delegations of authority to executive agencies despite the nondelegation doctrine); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Richard J. Pierce, Jr., *Two Problems In Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300 (arguing that the combination of very demanding standards for justifying agency rulemaking when reviewed by the federal courts of appeals and the intense and intrusive politicization of the D.C. Circuit has rendered agency rulemaking much less attractive than ad hoc adjudication and that *Chevron* provides a wonderful remedy for this problem by reining in the D.C. Circuit); Symposium, *Judicial Review of Agency Statutory Interpretation*, 2 ADMIN L.J. 243 (1988); Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587 (1984); see also Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990) (arguing first that *Chevron's* allocation of "governmental authority . . . far exceeds [in importance] that of the Supreme Court's more celebrated constitutional rulings on the subject of separation of power," but then reformulating *Chevron* to stand for the much less radical proposal that a reviewing court will not defer if it has a "firm" view that an administrative agency's interpretation is wrong, even if the agency's interpretation is potentially reasonable).

6. See Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron*, U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275 (arguing that *Chevron* is best interpreted as a voluntary, prudential limitation on the Supreme Court's review of agencies and, as such, *Chevron* should be applied flexibly, on a case-by-case basis); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (arguing that *Chevron* implicitly redefines separation of powers in a naive and unhealthy manner); Starr, *supra* note 3; Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 438 (1989) (claiming that one of the logical implications of *Chevron* is that committee reports and other bits and pieces of legislative history should be available to an administrative agency that is trying to interpret its own statute); Sunstein, *supra* note 5.

7. William S. Jordan, III, *Deference Revisited: Politics as a Determinant of Deference Doctrine and the End of the Apparent Chevron Consensus*, 68 NEB. L. REV. 454 (1989).

8. William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992) [hereinafter Eskridge & Ferejohn, *The Article I, Section 7 Game*]; William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165 (1992). See also Peter Strauss & Andrew Rutten, *The Game of Politics and Law: A Response to Eskridge and Ferejohn*, 8 J.L. ECON. & ORG. 205 (1992).

9. The Eskridge and Ferejohn work builds on their own prior work, and the work of many others working in the field. For an introduction, see the symposia contained in 8 J.L.ECON. & ORG. 1-214 (1992) and 12 INT'L REV. L. & ECON. 123-284 (1992), and DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). For a good review of the part of the literature dealing with Supreme Court decisionmaking, see Peter H. Aranson, *Models of Judicial Choice as Allocation and Distribution in Constitutional Law*, B.Y.U. L. REV. 745 (1990).

claim that aggressive judicial review of administrative agencies can help restore some of the original balance. Consequently, *Chevron*, which reins in the judiciary, has little to recommend it.

A third article by Peter Schuck and Donald Elliott used an empirical approach to study the effect of *Chevron* on the lower federal courts.¹⁰ Schuck and Elliott read and coded federal appellate opinions from four six-month periods—1965, 1974-75, 1984, and 1985—and from a two-month period in 1988.¹¹ Part of the study focused on the effect of *Chevron* on the rate of affirmance of administrative decisions. Schuck and Elliott found, among other things, that *Chevron* significantly reduced the rate at which federal courts of appeal remanded cases based on rejection of an administrative agency's interpretation of its own statute.¹²

A fourth article, by Thomas Merrill,¹³ examined Supreme Court decisionmaking before and after the *Chevron* decision. He found that the Supreme Court has not been faithful to *Chevron*, often failing to follow the *Chevron* framework and failing to accept administrative agency interpretation of statutes.

The work of Eskridge and Ferejohn, Schuck and Elliott, and Merrill provides extremely valuable new insights into *Chevron* and its relationship to the modern system of administrative government in the United States. However, all four articles leave unsolved some crucial puzzles about the *Chevron* decision. Eskridge and Ferejohn fail to address the issue of *why* the Supreme Court would adopt the *Chevron* doctrine. As part II of this article shows in greater detail, Eskridge and Ferejohn's analysis suggests, at least at first glance, that Supreme Court Justices will get less preferred political outcomes under *Chevron* than under aggressive judicial review. Hence, one might think that rational Supreme Court Justices would refuse to adopt the *Chevron* doctrine. The Court's adoption of the *Chevron* doctrine, therefore, poses a theoretical puzzle.¹⁴ Schuck and Elliott, whose work concentrates only on federal courts of appeal, leave an empirical puzzle: what is the effect of *Chevron* on subsequent Supreme Court review of administrative agency interpretations of statutes? Merrill provides a good first effort at reviewing the Supreme Court data, but his work

10. Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

11. *Id.* at 990.

12. *Id.* at 1034-35.

13. Merrill, *supra* note 5.

14. Susan Rose-Ackerman has personally suggested to us that modern cases on standing to challenge administrative agency actions present much the same puzzle. See, e.g., *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990). Professor Michael Asimow has suggested to us that a whole host of rules effectively preventing litigants from entering the court system—political question doctrine, items committed to agency discretion by law, immunities, and, of course, standing—might also prevent the Supreme Court from having a chance to muck around with administrative agency policies. Why would the Supreme Court promulgate rules excluding litigants? We might explain these rules with a model similar to our rational choice model, *infra* part II, by modeling the exclusion of litigants from the court system as infinite deference to the agency.

misinterprets the nature of Supreme Court decisions. In order to determine the signal that the Supreme Court sends to lower courts, the Court's decisions must be placed in a hierarchical framework. We attempt this modeling exercise here.

While part II of this article attempts to solve the puzzle of why a rational court would adopt the *Chevron* doctrine, part III presents evidence on the change in court behavior induced by *Chevron*. The results suggest the following scenario: by the mid-1980s, the Supreme Court and the administrative agencies had moved to a conservative policy position relative to both Congress and the appellate courts. Consequently, agencies could rule in a conservative manner only if allowed to exercise greater discretion in their interpretation of federal statutes. The Supreme Court could grant greater discretion by signaling to the appellate courts that they should allow agencies greater discretion in the interpretation of statutes. For about three years following *Chevron*, the Supreme Court continued to signal the appellate courts to afford agencies greater discretion. Furthermore, the rate at which the courts of appeal upheld administrative statutory interpretations first increased and then declined, just as the rational equilibrium model of case filings predicts.

The data further indicate that by the late 1980s appellate courts had moved closer to the Supreme Court's policy position, while the administrative agencies under President Bush had become more liberal. As a consequence, the Supreme Court wanted appellate courts to take a more active role in determining administrative policy and therefore stopped sending signals demanding greater deference to administrative statutory interpretations.¹⁵

II

THE RATIONALITY OF THE ADOPTION OF *CHEVRON*

Eskridge and Ferejohn utilize a formal, sequential model of governmental action to assess the effect of the *Chevron* decision. They assume that political outcomes can be arrayed on a dimension running from conservative to liberal, right to left. The political actors in their model have ideal points on the political spectrum, and understand the nature of the game, including the preferences of the other political actors. Everyone anticipates the behavior of the other actors

15. Dan Rodriguez has personally suggested to us that *Chevron* would better be analyzed within the more general framework of judicial review of administrative action. In particular, the *Chevron* puzzle cannot be solved without considering *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983), a case that was almost contemporaneous with *Chevron* and which some thought sounded the clarion call for judicial review of administrative choice of policy. The two cases, read this way, seem to contradict the traditional administrative law principle that law is for courts and that policy is for agencies.

While as a general matter we agree with Rodriguez, we will not pursue his suggestion in this article. We are not sure *State Farm* was the signal for less deference on policy matters. There were conflicting cases at about the same time, such as *Baltimore Gas & Electric Co. v. N.R.D.C.*, 462 U.S. 87 (1983), and we have not checked the cases for sustained signals for less (or more) deference during that time. The research program should be fairly easy to follow, after reading this article, and we hope some day to have the funds to send some graduate students to do the legwork.

but cannot commit to future courses of action. Each actor prefers that his or her decisions not be overturned.

Eskridge and Ferejohn use the following notation, which we will follow:

SQ =	Existing policy (status quo), the default position if no legislation is enacted to deal with a social problem
H and S =	Preferences of the median legislator in the two chambers of the bicameral legislature
P =	Preferences of the president
h and s =	Preferences of the pivotal legislator in the House and Senate, whose vote is needed for the two-thirds majority needed to override a presidential veto
x =	Statutory policy resulting from the game ¹⁶

First, Eskridge and Ferejohn analyze the political game without any administrative agency, and show how this game tends to preserve the status quo. Consider the following array of preferences on the policy spectrum.

h	P	SQ'	H	s	SQ	S
_____	_____	_____	_____	_____	_____	_____

Under this array of preferences, any status quo between P and S will be stable. H and S will be unable to pass a statute that they both prefer to SQ , and which P also prefers. If the status quo is SQ , H and S will be unable to pass any statute. If the status quo is SQ' , H and S will be able to pass a bill moving the status quo to some x between H and S .

h	P	SQ'	H	x	s	S
_____	_____	_____	_____	_____	_____	_____

However, P will veto x , and h will vote to sustain the veto.

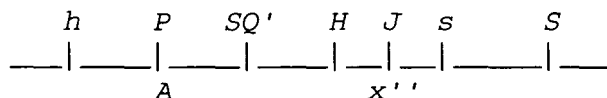
Next, Eskridge and Ferejohn introduce an administrative agency, A , into the model, and allow it to choose a new status quo in the first step of the game. A 's preferences are assumed to equal those of P . As a consequence, the new statutory outcome, x' , gives P much more of what he or she wants than he or she would get in the absence of A . To see this, consider the policy preferences from above, but with the A inserted.

h	P	SQ'	H	s	S
_____	_____	_____	_____	_____	_____
$A=x'$					

16. Eskridge & Ferejohn, *The Article I, Section 7 Game*, *supra* note 8, at 529.

With an administrative agency, the outcome shifts to $x'=A=P$, since the administrative agency can act unilaterally, without the approval of the House or Senate.

Eskridge and Ferejohn lament this shift in the balance of power to effectuate outcomes, and then investigate the power of judicial review to ameliorate the shift of power to the president. To do this, they introduce the median Justice of the Supreme Court, J , in a way that can override the agency's choice of a new status quo policy. They then show that the new policy outcome, x'' , is closer to the outcome with no administrative agency, x , than was the outcome with an administrative agency but no judicial review, x' .



If the Court is faithful to the law, assumed to be at SQ' , then the outcome will be at SQ' , the same as if there had been no administrative agency. If, instead, the Court is a rationally self-interested maximizer, the outcome will depend crucially on where the Court is located. In the array pictured above, the Court can choose its ideal point, which is stable within the game described by article 1, section 7 of the Constitution. As long as J is located within (H, S, P) , $x''=J$. If J were to the right of S , $x''=S$, while if J were less than P , $x''=P$. It is only in this last case that P gets his or her ideal point, the outcome all the time without judicial review. Hence, judicial review shifts power away from A and toward J , which may also be in the direction of H and S .

Eskridge and Ferejohn associate the *Chevron* doctrine with no judicial review, and the pre-*Chevron* law with judicial review. They conclude that *Chevron* is institutionally and normatively regrettable.

Regardless of whether or not the reader accepts Eskridge and Ferejohn's normative conclusion,¹⁷ the reader should notice that the *Chevron* doctrine results in policy outcomes that are, from the Court's point of view, worse than the status quo. This phenomenon poses a puzzle. Why did the Supreme Court adopt the *Chevron* doctrine? This article next explores three theories of the rational adoption of *Chevron*.

17. See Strauss & Rutten, *supra* note 8 (criticizing Eskridge and Ferejohn's normative conclusions).

A. Genuine Belief in the Political and Institutional Arguments

One possibility, which cannot be readily discounted, is that all or some of the Justices genuinely believe the political and institutional arguments advanced for the *Chevron* doctrine.¹⁸ The arguments advanced in favor of *Chevron* include at least the following: administrative agencies are expert agencies, and their expertise extends to interpretation of their own statutes; much agency action, including interpretation of statutes, is fundamentally political, and administrative agencies are directly accountable to the more political branches; and, generally, courts and administrative agencies are in a “checks and balances” relationship, as suggested by *Vermont Yankee v. N.R.D.C.*,¹⁹ rather than in a “supervisory” relationship, similar to that of the Supreme Court to lower federal courts.

Supreme Court Justices who believe these or other institutionally based arguments supporting the *Chevron* doctrine might vote for the *Chevron* doctrine despite its tendency to give them less of what they want in terms of substantive policies. Such Justices might believe that it is wrong to choose the appropriate degree of deference to be paid to administrative agencies based on the Justices’ personal preferences over policies. As in the Eskridge and Ferejohn model, we would say that judges are utility maximizers. However, unlike the Eskridge and Ferejohn model, we claim that judges derive utility from legal procedures as well as from policy outcomes.

Although the “genuine belief” response provides a solution to the *Chevron* puzzle, we will press for additional solutions for two basic reasons. First, the genuine belief theory posits that Supreme Court Justices vote *only* on the basis of preferences about institutional relationships. This is most unlikely. Justices undoubtedly have preferences about judicial and administrative processes, but not to the exclusion of policy considerations. Justices probably have preferences about both levels of deference and policy outcomes, and vote with both objectives in mind. Second, the theory explains *Chevron* as the result of some sort of group epiphany in 1984; *all* the Justices realized at once that the federal courts should defer to administrative agency statutory interpretations. This also seems a bit unlikely. Hence, this solution to the *Chevron* puzzle seems to lack intuitive appeal to those sophisticated in the ways of the Supreme Court. The next part proposes an explanation that allows Justices to have preferences about policy outcomes along with their preferences about levels of deference, and to vote on the basis of both.

B. A Rational Choice Model

Our best attempt at resolving the puzzle adds two important elements to the Eskridge and Ferejohn model. First, we focus on the relationship of the federal appellate courts to both administrative agencies and the Supreme Court: the

18. Chief Justice Rehnquist, Justice Marshall, and Justice O'Connor did not participate in *Chevron*.

19. *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519 (1978).

administrative agency chooses a policy which gets reviewed in a federal court of appeals in accordance with the level of deference to the agency chosen by the Supreme Court. Second, we posit that individual Justices have preferences over a two dimensional space, with deference on one axis and policy on the other.

1. *Adding Courts of Appeals and Two Dimensional Preferences into the Game.* Posit a five-stage sequential game in two dimensional space. On the y axis, place degree of deference given to administrative agency statutory interpretations. On the x axis place policy outcomes:

Stage 0 (before the game): The House ("H"), Senate ("S"), and president ("P") pass a statute. The words of the statute, perhaps together with other elements such as legislative history and past administrative practice, produce a Best Statutory Interpretation ("BSI") point on the policy axis.²⁰

Stage 1: The Supreme Court ("SC") chooses a point d on the deference axis.

Stage 2: An administrative agency ("AA") chooses a point on the policy dimension.

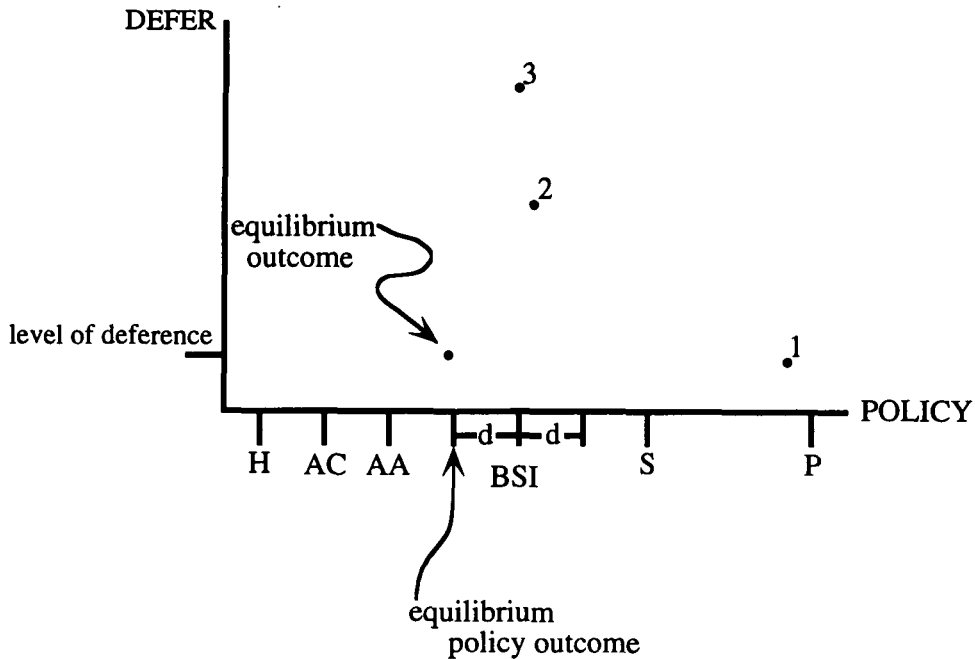
Stage 3: The appeals court ("AC") reviews the administrative agency decision. If the AA's choice is within the zone of discretion allowed by the Supreme Court ($BSI \pm d$) the appeals court leaves the administrative agency's choice alone. If the administrative agency's choice of policy is not within the zone of discretion ($BSI \pm d$), the appeals court may move the choice anywhere within the zone of discretion.

Stage 4: H , S , and P may revise the policy outcome.

To see how this game works, consider Figure 1. On the policy axis are arrayed the ideal positions of the House, appeals court, administrative agency, Senate, and president.

20. On statutory interpretation, see FARBER & FRICKEY, *supra* note 9; William N. Eskridge, *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation* 80 GEO. L.J. 705 (1992); McNollgast, *The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (Winter 1994); Merrill, *supra* note 5.

FIGURE 1



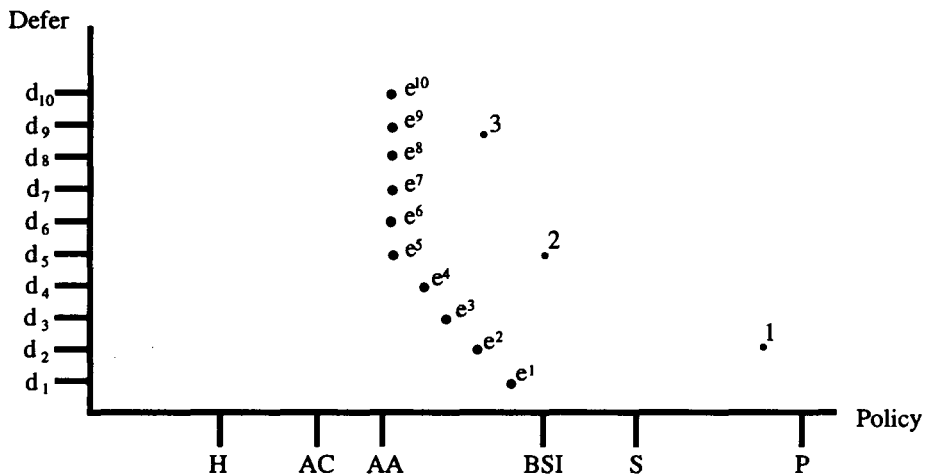
The Best Statutory Interpretation and the zone of discretion ($BSI \pm d$) have also been placed in figure 1. The ideal points of Justices 1, 2, and 3 are placed in the two-dimensional plane. Now consider the subgame comprised of stages 2 through 4. At stage 4 any outcome between H and P will be a structure-induced equilibrium. At stage 3, the AC 's strategy will depend on whether AA has chosen a policy within $BSI \pm d$. If so, AC has no choice at all, and the AA 's policy choice will survive to become the final outcome of the subgame. Hence, assume that AA has not chosen a policy within $BSI \pm d$. In that case, AC can do best by choosing the policy within $BSI \pm d$ that is closest to AC 's ideal point— $BSI-d$. In stage 2, AA will maximize its own utility²¹ by choosing $BSI-d$, and that will be the subgame equilibrium outcome. The equilibrium outcome on the plane has been placed at the point $(BSI-d, d)$.

The analysis of the subgame can be repeated for different values of d , each time producing a different equilibrium outcome and an associated point in the plane. Figure 2 shows ten such subgame equilibrium points. Discretion levels are labeled one through ten as d_1 through d_{10} on the y axis and the associated

21. If there is even ϵ disutility to being reversed, AA will prefer to choose $BSI-d$ rather than have AC choose it.

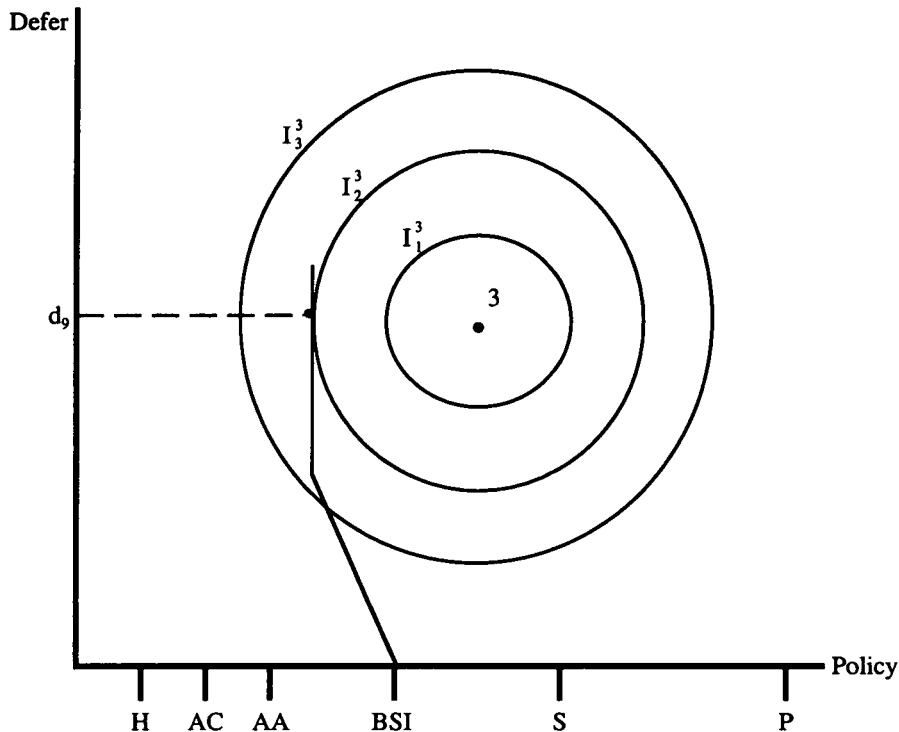
equilibrium outcomes labeled, e_1 through e_{10} , are placed in the plane. Note that once the level of $BSI-d$ is less than AA , increasing the amount of discretion does not change the subgame equilibrium policy outcome. If the agency has enough discretion to choose its own ideal point, it will do so; further increasing the amount of discretion it has will not change the agency's behavior.

FIGURE 2



Now, consider the preferences of each individual Justice at stage 1 of the game. For each level of deference the Justice might consider, there is an associated policy equilibrium. Because the Justice has preferences over both of these dimensions, he or she must consider both dimensions. In Figure 3, we have placed Justice 3, along with his or her circular indifference curves I_1^3 , I_2^3 , and I_3^3 . Justice 3 would prefer to choose that level of deference that corresponds to the equilibrium point that is closest to his or her ideal point. In Figure 3, that level is represented by the point of tangency between I_2^3 and the locus of subgame equilibrium points, and discretion level d_9 will generate that outcome.

FIGURE 3

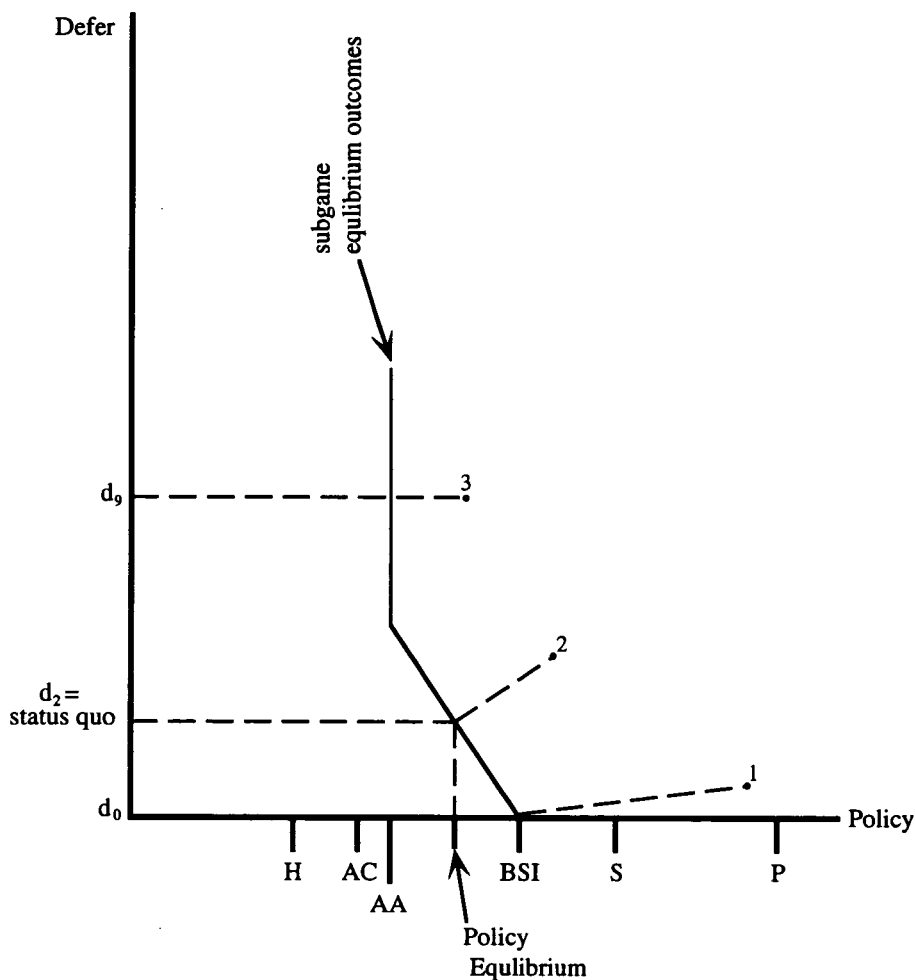


If Justice 3 were to be allowed to pick the level of deference alone, he or she would pick d_0 . Justice 3 does not, however, have that power. Instead, the level of deference is chosen by majority rule of the Justices on the Supreme Court. Figure 4 places the ideal points of Justices 2 and 1,²² and indicates their most preferred levels of discretion. Justice 2 prefers d_2 , while Justice 1 would prefer d_0 —no discretion at all. We can find the outcome of this majority rule vote by using Black's median voter theorem.²³ Justice 2's preference, d_2 , will prevail, and the point indicated as "Policy Equilibrium" will be the outcome on the policy dimension. This completes the game.

22. There is nothing fundamentally different about a three judge and a nine judge court in public choice theoretic terms.

23. Note that the Justices' preferences are all single-peaked along the deference dimension.

FIGURE 4



Note several things about this game. First, the role of the Supreme Court is restricted to management of the appeals court. (We have implicitly assumed that *certiorari* is prohibitively costly for any given case.) Second, the preferences of all of the actors except the Justices of the Supreme Court are restricted to the policy axis. The Justices of the Supreme Court care both about deference and policy, while everyone else cares only about policy.²⁴ Third, some Justices might vote for levels of deference that are very different from the level of deference indicated by their ideal points. In our example, Justice 2 voted for d_2 , while his or her ideal point indicates a much higher level of deference.

24. This is probably realistic for the purely political actors. However, for the administrative agencies and the appeals courts, this might be a bit of a stretch. Since neither the agencies nor the appeals courts can *do* much of anything about the levels of deference, however, they might well be prompted to act as if they had preferences only along the policy axis.

2. *1981.* We think the x axis in Figure 4 presents a fair characterization of the situation at the beginning of the Reagan Administration. The House was liberal, the President very conservative, and the Senate, which had fallen into Republican control, was also relatively conservative. The courts of appeals, infused by many new Carter appointees, were fairly liberal, as were the leftover Carter administrative agencies. The ideal points of the Justices represent a lot of guesswork. The *policy* preferences seem mildly unobjectionable. Listing the median Justice, J_2 , as a moderate/conservative (Potter Stewart, for example) seems right. But the preferences of the Justices over the deference dimension are largely guesswork, generated quite frankly by the need to make the model work with the facts of *Chevron*.

What predictions does this model produce? First, administrative agencies should be interpreting statutory language in a fairly liberal manner, although not as liberally as some might like. Second, the newly elected, conservative President should be unhappy about it.

3. *1984 and Chevron.* By 1984, the situation facing the Supreme Court had changed significantly. By this time, the Supreme Court was reviewing cases from administrative agencies that had become considerably more conservative.²⁵ This shift in the position of administrative agencies led to an immediate shift in the interpretation of statutes and more conservative policy outcomes. Figure 5 depicts these changes. The administrative agency's ideal point has moved from AA to AA', and the agency has reinterpreted the statute from *BSI-d* to *BSI+d*. This produces a new status quo just prior to the *Chevron* case. The rightward shift in the agency's ideal point also produced an entirely new set of subgame equilibrium points in the plane. In Figure 5, the old set of subgame equilibrium points is indicated by the dashed line, while the new set of subgame equilibrium points is indicated by the solid line.

The Supreme Court Justices must deal with this new status quo and set of subgame equilibrium points when deciding upon the appropriate level of deference. A new level of deference will be found in much the same way that d_2 was determined before AA moved right. Each Justice will determine his or her ideal point on the set of subgame equilibrium points, and then derive his or her ideal level of discretion. The level of discretion will be selected by a majority rule vote of all of the Justices.

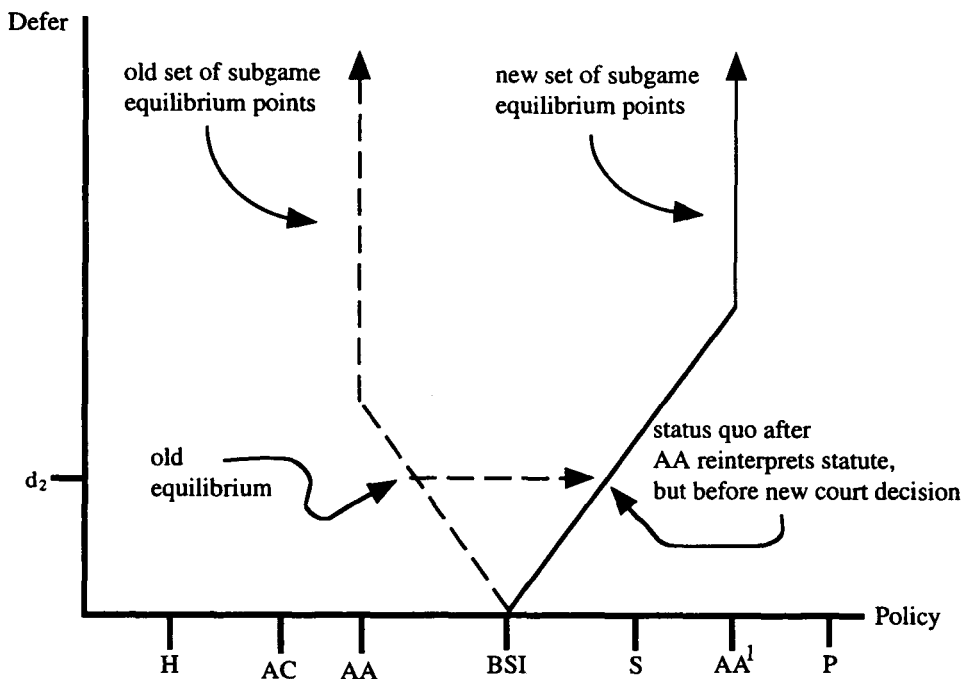
Figure 6 sketches an outline of the *Chevron* decision. The figure presents the ideal points of Justices 1, 2, and 3, and indicates the indifference curve for each Justice that passes through the status quo just before *Chevron*. It also shows the projections of the Justices' ideal points onto the set of subgame equilibrium

25. Our model builds in a three-year lag in Supreme Court behavior, implicitly assuming that the Supreme Court responds to the cases it must hear, rather than reports of changes in administrative agency behavior reported in the newspapers. See *infra* part III.C.

points. The derived level of deference—that preferred by the median Justice²⁶—is indicated in Figure 6 as $d_{Chevron}$. The figure indicates the new equilibrium outcome, which produces somewhat more conservative policy outcomes than did the status quo ante.

The indifference curves in Figure 6 reveal that all of the Justices prefer the new equilibrium to the status quo ante. Hence, one might expect²⁷ the *Chevron* decision to have been unanimous.

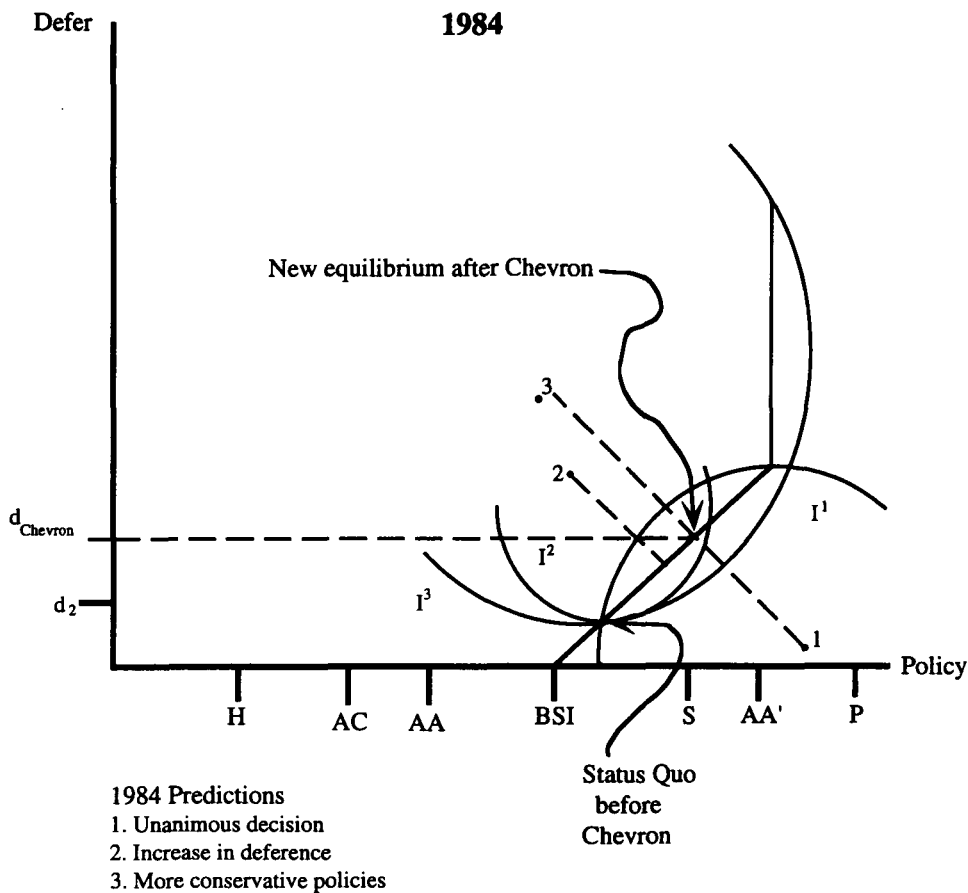
FIGURE 5



26. In this example, that would be either Justice 1 or Justice 3, for they seem to agree on the level of deference.

27. This presumes honest voting by the Justices in a vote comparing the status quo ante (d_2) to *Chevron* ($d_{Chevron}$).

FIGURE 6



4. *Institutional Background.* The rational choice model has roots in a recent article by Professor Peter Strauss,²⁸ in which he investigates the effects of the Supreme Court's relationship with lower federal courts and administrative agencies on administrative law. In particular, Strauss suggests that "the Court's opinions on the merits may be influenced by its management dilemmas. It may choose outcomes that tend to make its control over the appellate courts more effective; or that tend to reduce the opportunities those courts might enjoy for adventurism free of close supervision by the Court."²⁹ Strauss's analysis stresses

28. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

29. *Id.* at 1095.

uniformity and rule of law values, and does not delve into the Court's political manipulation of the other branches of government. In these regards, his analysis differs greatly from ours. Strauss's focus on the Supreme Court's task of controlling the courts of appeals' review of agencies is, however, very similar. Recall that in our model the Supreme Court does not, in general, decide cases. Instead, the Supreme Court chooses a level of deference that the appellate courts apply to the administrative agency.

Consider as an example the case of *Rust v. Sullivan*³⁰ within the context of our rational choice model. Congress enacted Title X of the Public Health Service Act³¹ in 1970, providing federal money for "family-planning services."³² The Secretary of Health and Human Services was authorized to "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services."³³ The Public Health Service Act also contained a very important constraint: "none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."³⁴

In 1988 the Secretary of Health and Human Services issued regulations excluding all postconceptual care, *including abortion counseling or referral*, from the definition of "family planning."³⁵ Some recipients of Title X funds sued Secretary of Health and Human Services Louis Sullivan, claiming (among other things) that his interpretation of Title X was wrong. Justice Rehnquist, writing for a five to four majority, applied *Chevron* to the question of statutory interpretation. Neither statutory language nor legislative history resolved the question of whether abortion counseling and referral was part of "family planning."³⁶ The Secretary's interpretation was held permissible, considering all of the circumstances.³⁷

30. 111 S. Ct. 1759 (1991).

31. Pub. L. No. 91-572, § 6, 84 Stat. 1504, 1506 (1970) (codified as amended at 42 U.S.C. §§ 300-300a-41 (1988)).

32. *Sullivan*, 111 S. Ct. at 1770.

33. 42 U.S.C. § 300(a) (1988).

34. *Id.* § 300a-6.

35. "Title X project[s] may not provide counselling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." Grants for Family Planning Services, 42 C.F.R. § 59.8(a)(1) (1992). The Secretary also issued regulations requiring complete physical and financial segregation between Title X family planning programs and affiliated entities that provide abortion counseling or services. *Id.* § 59.9.

36. Our model builds in a three-year lag in Supreme Court behavior, implicitly assuming that the Supreme Court responds to the cases it must hear, rather than reports of changes in administrative agency behavior reported in the newspapers, etc. See *infra* Part III.C.

37. *Sullivan*, 111 S. Ct. at 1770-71. Justice Blackmun, writing for the dissent, invoked the canon of statutory construction that statutes are to be construed so as to avoid serious constitutional issues. Because there were serious First and Fifth Amendment challenges to these regulations, claimed Justice Blackmun, the statute should be construed to prohibit the regulations. *Id.* at 1780-86. Justice Rehnquist avoided this argument by asserting "[t]here is no question that the statutory prohibition . . . is constitutional." *Id.* at 1772.

Rust provides an illustration of the model. A conservative Supreme Court used *Chevron* to compel deference to a conservative department of Health and Human Services. The court of appeals deferred, but little can be inferred from that fact. The court of appeals may merely have deferred because it was clear (or seemed so) that *Chevron* compelled deference. Or the court of appeals may have deferred because it agreed with the Secretary's statutory construction. In any event, the theoretical effect of *Chevron* should be clear—*Chevron* allowed the Secretary of Health and Human Services to make very conservative policy, free of any possible revision by the court of appeals.

5. *Problems in the Rational Choice Model.* Although the rational choice model does a much better job than the Eskridge and Ferejohn model of representing the *Chevron* doctrine and explaining why the Supreme Court would adopt the doctrine, the rational choice model has some serious problems.

a. *Ideal points.* The result depends crucially upon the arrangement of the actors and statutory language. There are two crucial features. First, by 1984, the relative positions of statutory language and administrative agency ideal points must change. In 1981, the administrative agency must prefer points more liberal than statutory language, and by 1984 must prefer points more conservative than the statutory language. Although it is possible to think of obvious examples where this is true (for example, the Civil Rights Division of the Justice Department), it is by no means obvious that the condition was true *in general*. Second, the results are quite sensitive to the Supreme Court Justices' preferences. Small alterations in the Justices' willingness to trade process for policy would reduce the accuracy of the model's predictions.³⁸

b. *The role of courts of appeals.* The model fails to give an important enough role to courts of appeals. In equilibrium the administrative agency's statutory interpretation is not reversed. What is more, the agency's statutory interpretation is not affected by the location of the court of appeals in the model. This is probably wrong, as a factual matter. The courts of appeals, after all, make occasional forays into statutory interpretation, pulling the interpretation *away* from more likely interpretations of the words and legislative history of the interpreted act.³⁹

If we were to rework the model to give a more prominent place to courts of appeals, we would give the Supreme Court additional reasons to mandate great

38. It is difficult, in general, to deduce ideal points of the Justices from their opinions about either process *or* policy. The Justices have preferences over both dimensions and must be willing, at times, to trade one in favor of the other. Conservative Justices who give agencies substantial deference must tolerate some uses of discretion in a liberal direction. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). It is this phenomenon, in part, that leads us to model the courts of appeals as responsive to large numbers of decisions from the Supreme Court. See *infra* Part III.C. (discussing signals from the Supreme Court to the courts of appeals).

39. See McNollgast, *supra* note 20.

deference whenever the distance between the preferences of courts of appeals and the Supreme Court were to grow large. The production of such a model, however, must await future work.

c. *Biased zones of discretion.* The model presumes that when the Supreme Court chooses a level of deference, d , the resulting zone of discretion is defined by $BSI \pm d$. The zone of discretion is centered at BSI . It is possible to produce alternative formulations in which the Supreme Court selected zones of discretion that were not centered at BSI . For example, in 1981, the Supreme Court might have tried to define a zone of discretion ($BSI, BSI+2d$). Such a zone would have the same width, but would be biased to the right. If the Supreme Court had adopted such a rule in 1981, it would not have had to decide *Chevron*; the existing zone of discretion would have included the equilibrium point under *Chevron*.

We think our model of zones of discretion centered at BSI captures a natural institutional feature of administrative law. It is difficult for a court to announce a rule of process that is contingent on the *political direction* in which the agency exercises discretion. A decision that said "administrative agencies are more democratically accountable than courts if and only if the agencies exercise their discretion to interpret statutes in a conservative direction" would be laughable. Courts, we assert, try to avoid being laughingstocks. Hence, zones of discretion centered at BSI , coupled with adjustments in the degree of deference, is the best the Supreme Court can do.

d. *Control of Deference by Congress and President.* The model neglects control of the level of deference, d , by H , S , and P . To the extent that the level of deference is a prudential rather than a constitutional rule, H , S , and P could revise the level of deference through an ordinary statute. Section 706 of the Administrative Procedure Act seems to suggest that H , S , and P have instructed the Supreme Court to give *no* deference to administrative statutory interpretations.⁴⁰ These instructions could be reiterated or modified; the Bumpers Amendment⁴¹ attempted to reinforce and extend the rule of no deference, but failed to gain passage. The model implicitly assumes that such techniques of controlling the Supreme Court's choice of deference are ineffective, or so costly as to preclude effective use. Future models could relax this assumption, and derive the behavior of H , S , and P as part of an equilibrium.

e. *Certiorari.* The model of *certiorari* is extremely primitive; *certiorari* is never granted and the Court never hears any case on the merits. The Court has been modeled in this way to emphasize its supervisory role over the courts of appeals.

40. 5 U.S.C. § 706 (1988) ("[T]he reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions . . .").

41. S. 1080, 98th Cong., 1st Sess. (1983).

In fact, as emphasized in part III of this article, the Supreme Court must grant *certiorari* to some cases in order to signal the appropriate level of deference to the courts of appeals.

The next step is to produce a model including a better representation of *certiorari* that explains why the Supreme Court would decide *Chevron* as it did. There are several existing models of the *certiorari* process that might do the trick, the most promising of which were produced by Pablo Spiller and Edward Schwartz.⁴² Producing such a model must wait for future research.

C. A Third Explanation—Logrolling

The third potential explanation regards *Chevron* as an elaborate logroll between various members of the Court. The logrolling explanation is far less satisfactory than the mixed process and policy rational choice model described above. Nevertheless, we include the logrolling model for two reasons. First, and most important, the logrolling model explains the generality of legal doctrines in a new and important way. Although the logrolling explanation of *Chevron* may be less than compelling, the logrolling model may apply with more force to other doctrines. Second, we intend this article to include a current catalog of rational choice type explanations for *Chevron*, and the logrolling explanation certainly belongs in the catalog.

The logrolling explanation presumes at least the following: there is more than one type of administrative agency. At the very least there are executive branch agencies, and independent administrative agencies. There are some systematic differences between executive branch and independent agencies. For example, the president has the inherent right to fire heads of executive branch agencies, but most heads of independent agencies that have protection from being fired under the terms of their statute cannot be summarily dismissed by the president. In another example, Executive Orders 12,291 and 12,498, subjecting new administrative rulings to cost/benefit analysis, have been applied only to executive branch agencies.⁴³ These differences should be enough to give the president more effective control over the behavior and preferences of the executive branch agencies.

Next, we presume that the various members of the Court have different preferences over the different functions performed by independent and executive agencies. In particular, we must presume that there are three groups of Justices whose preferences can be represented by the following chart.

42. Pablo T. Spiller, A Rational Choice Theory of *Certiorari*: Hierarchy, Strategy and Decision Costs at the Courts, Faculty Working Paper 91-0110, Political Economy Series #44 (Department of Economics, University of Illinois at Urbana-Champaign); Edward P. Schwartz, Information, Agendas, and the Rule of Four: Nonmajoritarian *Certiorari* Rules for the Supreme Court (Harvard University Center for American Political Studies, Occasional Paper 93-10/April 1993).

43. For an insightful introduction to these matters, see Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989).

	ISSUES	
	Independent Agencies	Executive Agencies
Justices		
A	10	1
B	-2	2
C	-1	-10

The chart shows the utilities of Justices *A*, *B*, and *C* for moderate (as opposed to conservative) interpretations of statutes controlling independent administrative agencies and executive branch agencies.

The chart shows that the Justices in group *A* strongly prefer moderate, rather than conservative, interpretations of statutes governing independent administrative agencies. These same Justices have a very mild preference for a moderate, rather than conservative, interpretation of statutes governing executive branch administrative agencies. Justices in group *B* prefer conservative interpretations of independent administrative agency statutes and moderate interpretations of executive branch agency statutes. Justices in group *C* prefer conservative interpretations of both independent and executive branch agencies, but have a much stronger preference for the conservative interpretations of executive agencies. If all Justices vote their preferences honestly, then we will get conservative interpretations of independent administrative agency statutes (because Justices in groups *B* and *C* will vote this way) and moderate interpretations of executive branch agency statutes (because Justices in groups *A* and *B* will vote this way). Justices in groups *A* and *C*, however, can agree to exchange votes, with the group *A* Justices promising to vote for a conservative interpretation of executive branch agency statutes, and the Justices in group *C* promising to vote for a moderate interpretation of independent agency statutes. Such a trade makes Justices in groups *A* and *C* better off, while Justices in group *B* are losers.⁴⁴

There are several impediments to such a direct vote trade, however. First, open vote trading may violate norms of appropriate behavior on the Court. There is precious little evidence of naked vote trading on the Supreme Court. Second, such a trade would invite cheating, for some Justices would have to perform first, as cases came before the Court. Other Justices would then be strongly tempted to cheat on the agreement, hiding their defections behind false disagreements about whether statutory language will support particular interpretations. The agreement would quickly unravel. The problems with cheating, however, could be ameliorated in a couple of ways. To the extent that the Justices have preferences over broad classes of rules, rather than over outcomes for individuals in particular cases, the Justices can bundle different

44. Such a trade, of course, is not stable. Justices in group *B* can try to woo Justices in either of the other groups.

cases in the same term together for decision on the same day. Also, "bright-line" rules, such as the rule of trimesters adopted in *Roe v. Wade*,⁴⁵ could reduce opportunities for post-trade cheating. Nevertheless, trading retains significant problems from cheating.

Third, there would often be real social costs involved in alternative statutory interpretations, and only an expert agency would know what the costs were. Supreme Court Justices would not know when they should be willing to let expertise trump politics.

The *Chevron* doctrine could be the Court's attempt to effectuate this vote trade and solve some of the problems. A doctrine of deference is not a naked vote trade and, therefore, would not violate basic norms of judicial behavior.⁴⁶ Such a doctrine would reduce cheating, in theory, because it announces a rule to cover all cases at once. Last, because the interpretation of statutes is delegated to the "expert" administrative agencies created under the statutes, the Justices do not have to worry about whether an expert would decide to let expertise trump politics. The experts have already spoken, and spoken within the political context of legislative and executive oversight.

What are the main problems with this explanation? There is no evidence that judicial preferences are aligned in the way needed to make this explanation work. In fact, there are several arguments cutting the other way. First, there are so many executive and independent agencies, covering so many different types of matters, that it would be surprising to find that preferences array across this dimension. Second, if the explanation is right, there should be a group of Justices (such as those in group *B*) opposed to *Chevron*. *Chevron*, however, was unanimous.⁴⁷

The unanimity issue could be handled in a couple of different ways within the rational choice framework. First, Justices Marshall, Rehnquist, and O'Connor

45. 410 U.S. 113 (1973).

46. Many commentators acknowledge the bargaining that takes place with respect to the writing of opinions. This phenomenon could be regarded as a form of logrolling, subject to some sort of germaneness (for example, "case or controversy" limitations on dicta in federal courts) restraint.

47. The argument could be retrofitted to respond to these two objections. If there were *three* types of administrative agencies, covering three types of issues, and three groups of Justices with preferences like the following, a three way logroll would be possible.

	Types of Agency Issues		
	1	2	3
Justices			
A	-1	-1	10
B	-1	10	-1
C	10	-1	-1

All Justices could agree to vote for all three issues, and all would be better off. If each type of administrative agency happened to be under political control such that it would perform appropriately, the Justices could adopt *Chevron*. Of course, there are opportunities for any two groups of Justices to invent some new doctrine that gives them what they want at the expense of the third group of Justices.

The main problem with such a formulation is that no natural array of issues and agencies suggests itself in accord with this model.

did not participate in the opinion. They might represent the missing Justices. Second, perhaps we should not trust the apparent unanimity of opinions released in June. Justices eager to get to vacation might sign onto opinions with which they actually disagree. Unfortunately, neither approach has much power. First, Marshall, Rehnquist, and O'Connor seem much more like individual representatives from three distinct groups, rather than a single group. Second, the missing Justices have, in subsequent cases, ratified the *Chevron* approach.⁴⁸ Hence, we will take the unanimity of *Chevron* seriously in this article.

The unanimity issue can also be handled by going outside of the rational choice framework. If the Justices in groups *A* and *C* convinced the Justices in group *B* of the institutional and jurisprudential appeal of the *Chevron* doctrine, then these Justices might have been persuaded to vote for the doctrine despite its tendency to give group *B* Justices less preferred outcomes. Ultimately, this leads back to the mixed process and policy public choice model in part II.A.2. of this article.

Last, *Chevron* does not cure the cheating problem. If the administrative regulation is patently unreasonable (outside the zone of discretion), the Court may do what it likes with the statute. In addition, if the statute is "clear," there is no discretion. Both of these issues within the *Chevron* doctrine allow Justices to give agencies no deference, thereby cheating on the deal.

In sum, we have suggested three ways to explain *Chevron*. First, the *Chevron* doctrine might be the product of genuine judicial preference for institutional roles. Second, *Chevron* might be a rational response by Supreme Court Justices to the Court's inability to review any significant portion of the output of the courts of appeals. Third, *Chevron* might be a type of logroll between different groups of Justices. Each solution to the *Chevron* puzzle has its problems, but we regard the second explanation as the most likely.

III

THE EMPIRICAL EFFECT OF *CHEVRON*

In this section we first review the results of Schuck and Elliott,⁴⁹ and of Merrill.⁵⁰ We then develop a model of Supreme Court signaling and present calculations of the implicit deference level in Supreme Court decisions. The section concludes with a discussion of how our results relate to the rational actor model of the judiciary discussed in part II.

48. See, e.g., *Pauly v. BethEnergy Mines, Inc.* 111 S. Ct. 2524 (1991); *American Hosp. Ass'n. v. NLRB*, 111 S. Ct. 1539 (1991); *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211 (1991).

49. Schuck & Elliott, *supra* note 10.

50. Merrill, *supra* note 5.

A. Schuck and Elliott

In *To the Chevron Station: An Empirical Study of Federal Administrative Law*,⁵¹ Peter Schuck and Donald Elliott read federal administrative law cases from four different eras in recent United States history.⁵² During the periods studied, the federal courts' caseload of administrative law cases decided on the merits more than tripled, from 489 cases in 1965 to 1567 cases in 1987.⁵³ The overall federal caseload grew even faster than the administrative portion, however, so the percentage of administrative law cases decided on the merits declined significantly from 1965 (sixteen percent) to 1987 (seven percent).⁵⁴ Perhaps in response to the growth in caseload, the federal courts relied increasingly on "table decisions." Table decisions are listed in the *Federal Reporter* and give only the names of the parties, disposition, docket number, date, and name of institution from which appeal was taken. No opinion is provided.⁵⁵ Schuck and Elliott could get no firm number or percentage of table decisions for 1965. In 1975, twenty-nine percent of their sample were table decisions. By 1985, fully sixty percent were table decisions. Schuck and Elliott noted that some of their findings were affected by whether or not the table decisions were included.⁵⁶

Schuck and Elliott proceeded to analyze a number of other trends in such variables as the length and footnoting of opinions,⁵⁷ the fragmentation of decisions,⁵⁸ the affirmance rate for administrative law decisions,⁵⁹ and the types of agencies involved in the proceedings.⁶⁰ They found that the mix of agencies involved in adjudication changed radically from 1965 to 1985. In 1965, the NLRB and the Patent and Trademark Office accounted for sixty-one percent of the total caseload, but by 1985 they accounted for only twenty-two percent. The Merit Systems Protection Board, which did not exist in 1965, accounted for

51. Schuck & Elliott, *supra* note 10.

52. They sampled opinions from 6-month periods in 1965, 1974-75, 1984 (just before *Chevron*), and in 1985 (just after *Chevron*), and from a 2-month period in 1988. Their data provides a wealth of insight on some of the most basic questions in administrative law: How many administrative law cases are there? What percentages of the overall federal caseload do they represent? Which agencies are most commonly sued? Who tends to win the cases? We will review only as much of their findings as we think is necessary to understand and extend their specific findings about the effect of *Chevron*.

53. There was a similar growth in the number of appeals from administrative action filed in the federal courts—1,106 cases filed in 1965 to 3,179 filings in 1985. Schuck & Elliott, *supra* note 10, at 997-98.

54. *Id.*

55. *Id.* at 1000. Schuck and Elliott report that sometimes memoranda are provided to the parties, and that some of these memoranda can be obtained through LEXIS or WESTLAW.

56. Because our extension of the Schuck and Elliott data uses only Supreme Court opinions, we do not include the Supreme Court analogue of table decisions—summary disposition.

57. Schuck & Elliott, *supra* note 10, at 1003-04.

58. *Id.* at 1004-07.

59. Schuck and Elliott's data seem to show a rising rate of affirmance, while data from the administrative office suggest a fluctuating rate. *Id.* at 1007-13.

60. Schuck and Elliott found that in 1965, adjudications accounted for 93% of all cases, and that by 1984-85 adjudications had fallen to "only" 87% of the codable decisions. Ratemakings and rulemakings rose, respectively, from 1.4% and 0.3% in 1965 to 5% and 7% in 1984-85. *Id.* at 1013-15.

27.5% of the caseload by 1985, and the Immigration and Naturalization Service took 13.7%.⁶¹ Schuck and Elliott also determined that the new federal circuit takes the lion's share of appeals from administrative action (36%), and that the D.C. Circuit's share has fluctuated (11.6% in 1965, to 22.7% in 1975, to 12.4% in 1984/85).⁶²

Schuck and Elliott also examined the extent to which the *Chevron* opinion altered the rate at which lower federal courts would affirm administrative action. Their null hypothesis was that *Chevron* would make no difference. Having "been educated . . . in the shadow of the Legal Realist tradition,"⁶³ they believed that the *Chevron* doctrine was malleable enough to let courts of appeals do whatever they wanted. Schuck and Elliott first tested their hypothesis by calculating the overall outcome rates (affirmed, reversed, remanded, or other) before and immediately after *Chevron*. The results are in the Table 1, below.

TABLE 1

	1984		1985	
	#	percent	#	percent
Affirmed	523	70.9%	763	81.3%
Reversed	106	14.4%	77	8.2%
Remanded	106	14.4%	87	9.3%
Other	25	3.4%	54	5.8%
Total	760		981	

Schuck and Elliott concluded that the distribution of outcomes after *Chevron* was different from the distribution of outcomes before *Chevron* at a confidence level of less than .01.⁶⁴

Schuck and Elliott also tested the distribution of doctrinal reason for outcomes—the question closest to the heart of the *Chevron* inquiry.⁶⁵ The *Chevron* doctrine addressed only the question of deference to an administrative agency's construction of its own statute, not issues of procedural regularity, factfinding, or exercise of discretion. Schuck and Elliott coded all remanded administrative law cases just prior to and just after *Chevron* into five groups: "(1) remands for errors of substantive law; (2) remands for errors of procedural law; (3) remands for lack of adequate factual support; (4) remands for lack of adequate explanation; and (5) remands for which no basis is given for the court's action (for example table decisions)."⁶⁶

In sum, there was a dramatic drop in law-substance based remands, coupled with a rise in all other categories. If one recodes the data as (1) law-substance

61. *Id.* at 1015-16.

62. *Id.* at 1019.

63. *Id.* at 1026.

64. *Id.* at 1030.

65. *Id.* at 1032-36.

66. *Id.* at 1032-33.

reasons and (2) all other reasons, and then computes a chi square test on the hypothesis that the pattern of reasons of remands is unchanged by *Chevron*, the null hypothesis can be rejected at a ninety-five percent confidence level.⁶⁷

TABLE 2
REASON FOR REMAND

	1984		1985	
	#	%	#	%
Law-Substance	38	35.8%	19	21.8%
Law-Procedure	16	15.1%	15	17.2%
Fact-Based	30	28.3%	28	32.2%
Rationale	19	17.9%	18	20.7%
Unstated	19	17.9%	20	23.0%
Total	122	115%	100	115%

Schuck and Elliott interpret the two results, fewer remands and a smaller percentage of remands based on legal substance, as disconfirming their legal realist presuppositions. They then pushed on to test the permanence of the *Chevron* effect by replicating the measures reported above on a two-month sample of appellate cases from March and April 1988.⁶⁸ They had no firm hypothesis about the long-term effects of *Chevron*. Lower federal courts might be a bit like children, reacting immediately to a stimulus, such as the sharply worded opinion in *Chevron*, but then quickly forgetting about the event and behaving as if it had never happened. Or perhaps unspecified institutional considerations produce regression to the historical mean rates of affirmance and remands based on substantive legal grounds. Last, it is possible that decisions subsequent to *Chevron* have changed the law.⁶⁹ On the other hand, *Chevron*'s effects might be persistent. The results, reported in Table 3, are a bit mixed.

TABLE 3

1988	#	%
Affirmed	111	75.5%
Reversed	12	8.2%
Remanded	25	17.0%
Other	3	2.0%
Total	151	102.72%

67. *Id.* at 1034.

68. *Id.* at 1038.

69. See, e.g., *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112 (1987); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

Obviously, the affirmance rate dipped, while the remand rate increased rather dramatically. (Schuck and Elliott did not compute data on the reasons for remands because there were too few to generate any meaningful comparisons with 1985.) In their overall conclusion, Schuck and Elliott wrote:

Within a few months after *Chevron*, the affirmance rate rose substantially, while reversals and remands decreased almost equally to account for the increased affirmance rate. Over the longer term, however, remands gradually returned to, and then exceeded, their pre-*Chevron* levels, eroding about half of the increase in affirmances that *Chevron* had produced.⁷⁰

Finally, Schuck and Elliott investigated whether or not the different circuits behaved differently. They found that the D.C. Circuit seems to behave somewhat independently of the Supreme Court's *Chevron* decision, but that the other circuits paid close attention, at least for a while.

TABLE 4
PERCENT AFFIRMED
D.C. CIRC. VS. ALL FED

	1965	1975	1984	1985	1988
DC Cir	46.5	60.6	58.6	52.6	61.5
All Fed	55.1	60.3	70.9	81.3	75.5

Schuck and Elliott regard their data as broadly confirming a *Chevron* effect, at least in courts other than the D.C. Circuit, and they are almost certainly correct. In fact, their work is extremely important, not only because it establishes a broad *Chevron* effect, but also because their article proposes that one *should* care about whether or not administrative law cases have any effect. Because their data were not constructed with our models in mind, there are some problems with using them in our article. First, the data gathered were targeted at a somewhat broader notion of the *Chevron* doctrine than the one upon which we focus. Recall that *Chevron* orders reviewing courts to give an administrative agency deference with regard to statutory interpretations, as long as the interpretations are within some zone of reasonableness. Ideally, to test the hypothesis that *Chevron* increased courts of appeals' deference, given the assumption that everything except the doctrine stayed constant, one would first collect cases pre- and post-*Chevron* in which the federal courts reviewed administrative agency interpretations of statutes. Next, one would compare the rate of deference to statutory construction before *Chevron* to the rate of deference after *Chevron*. The "no effect" hypothesis is that the rates should be equal. The alternative hypothesis, that *Chevron* affected federal court behavior, states that the rate of deference should rise after *Chevron*.

70. Schuck & Elliott, *supra* note 10, at 1040-41.

Unfortunately, Schuck and Elliott did not perform the appropriate comparison. They did compare rates of statutory/substance based *remands* before and after *Chevron*. But this comparison has two serious defects. First, there is no reason to restrict the test to remands. An administrative agency's statutory construction may have been rejected in the many cases that were affirmed or reversed. Second, Schuck and Elliott do not indicate how many statutory constructions were upheld.

The second problem derives from the large number of second and third order reactions to any Supreme Court decision. When the Supreme Court adjusts deference with a *Chevron*-type doctrine, many things may happen. As Schuck and Elliott point out, federal courts may adjust the way in which other aspects of administrative cases are reviewed.⁷¹ Further, administrative agencies may adjust their behavior by bringing different cases, pushing different rulemakings, and altering their own statutory interpretations. The Supreme Court may adjust its review of lower federal courts by changing its certiorari practices. And, over the long run, Congress and the president may change their actions by writing statutes differently, changing oversight, and appointing different administrators. We discuss some of these factors in part C, below.

B. Merrill's Data

Thomas Merrill analyzed Supreme Court decisions reviewing statutory interpretations by administrative agencies from 1981 to 1990. He produced the following two tables:

TABLE 5
PRE-CHEVRON TERMS

Term	A Total Cases Involving Deference Question	B Agency View Accepted	F Cases Citing Traditional Factors
1983	19	13 (68%)	11 (57%)
1982	15	11 (73%)	11 (73%)
1981	11	10 (90%)	8 (73%)
Total	45	34 (75%)	30 (66%)

71. *Id.* at 1028-29.

TABLE 6
POST-*CHEVRON* TERMS

Term	A	B	C	D	E	F
	Total Cases Involving Deference Question	Agency View Accepted	Framework Applied	Accepted	Chevron Framework: Cases Agency View Decided Step 2	Framework Citing Traditional Factor
1990	11	8 (73%)	6 (55%)	4 (66%)	2 (33%)	6 (55%)
1989	14	8 (57%)	9 (62%)	4 (44%)	2 (25%)	4 (29%)
1988	9	4 (44%)	3 (33%)	1 (33%)	1 (33%)	6 (66%)
1987	14	9 (64%)	5 (36%)	3 (60%)	3 (50%)	3 (21%)
1986	9	5 (55%)	2 (22%)	1 (50%)	1 (50%)	2 (22%)
1985	14	11 (78%)	6 (43%)	5 (83%)	4 (66%)	6 (43%)
1984	19	18 (94%)	1 (5%)	1 (100%)	1 (100%)	7 (35%)
Total	90	63 (70%)	32 (36%)	19 (59%)	14 (44%)	34 (37%)

Merrill noted that the overall rate of deference appeared to have fallen after *Chevron*. This result seemed counterintuitive for a case that ordered increased deference. Second, Merrill noted that the *Chevron* approach was frequently ignored in cases that should have followed it.

Merrill offered two basic explanations for the data. First, he suggested that if one were faithfully to follow *Chevron*, the effect would be so distasteful that even the Supreme Court would be unwilling to follow it consistently.⁷² Merrill suggested that the Supreme Court decisions in the years immediately following *Chevron* showed that the Court was even then unhappy with a strong deference doctrine. Second, he hypothesized that the 1988 case *K Mart Corp. v. Cartier, Inc.*,⁷³ revised the basic *Chevron* doctrine so as to provide far less deference to agencies.⁷⁴ He observed that in 1985-86, the rate of deference was rather high (in eighteen of twenty-five cases), while from 1988 to 1990, the rate of acceptance was much lower (in twenty of thirty-four cases).

Although Merrill's data were suggestive, they did not support his conclusions. Because the cases reviewed by the Supreme Court change over time, the overall Supreme Court uphold rates reveal little about changes in the Court's preferences for agency discretion and judicial deference. Ideally, one would want to analyze each case and deduce the absolute level of desired deference implied by its language. In practice, such a methodology is probably too subjective to be useful. Nevertheless, we can make some progress if we distinguish between several broad categories of cases.

First, by considering both the courts of appeals and Supreme Court actions in each case, we can directly infer if the Supreme Court desires lower courts either to increase or decrease the level of deference they grant to administrative

72. Merrill, *supra* note 5, at 983-84.

73. 486 U.S. 281 (1988).

74. Merrill, *supra* note 5, at 992.

agencies. In *Chevron*, the appeals court reversed the government, while the Supreme Court deferred to the government's statutory interpretation and reversed the lower court. Taken together, the two courts' decisions imply that the Supreme Court desired the lower courts to defer more to agency decisions. Alternatively, in *Rust v. Sullivan*, the Supreme Court deferred to the administrative agency, but the appeals court did as well. Because the Supreme Court affirmed the lower court position, it did not issue a directive to lower courts to change their standard of review.⁷⁵

To move from relative levels of deference between the different courts to changes in Supreme Court preferences requires further information about the cases. We expect that over time both the cases presented to appeals courts and appeals courts' decisions will change systematically. For example, if appeals courts follow the guidance in *Chevron*, then their subsequent decisions will incorporate more deference to administrative agencies. How should one interpret a subsequent case with the same decision record as *Chevron* (where the appeals court reverses the agency, and then the Supreme Court reverses the lower court and upholds the agency)? Because of the higher base level of deference, the Supreme Court would not be confirming *Chevron*, but rather calling for still greater deference to administrative agencies. To interpret Supreme Court decisions thus requires a model of judicial review that specifies adjustments by agencies, appellants, and lower courts.

In the remainder of this section, we consider the administrative review process in more detail and propose a method for unpacking Supreme Court decisions to address the issues sketched above. Next, we characterize the pattern of decisions that would be consistent with the model presented in section II. We then recast in this framework a data set comparable to that used by Merrill. As is discussed further below, the data are incomplete for our purposes; consequently our conclusions are preliminary and serve primarily to demonstrate the methodology.

1. *Administrative Reviews.* In the following figure (Figure 7), we consider a decision tree that characterizes six separate decisions culminating in a Supreme Court administrative law case. In step one, the agency issues its final decision.⁷⁶ The agency decides in favor of some party; its decision defines the government position for the subsequent steps in the judicial review. The losing party (who we call the "private party") decides the action at step two: whether or not to appeal. In step three, the appeals court chooses to affirm the government or to reverse the agency by ruling in favor of the private party. Step four is the

75. More precisely, the signal sent for deference in such a case is probably weaker than in the *Chevron* situation. Sometimes the Court is implicitly reviewing a set of conflicting lower court decisions; if so, then by affirming the case that deferred to the government, the Supreme Court at the same time rejects alternate lower court decisions. The distinction made here provides a first cut at deducing Supreme Court preferences.

76. This is, of course, a minimalist view of judicial review, and ignores the role of district courts, table decisions, and numerous other potential actions.

decision to seek Supreme Court review. The decision tree splits into two branches at step four, depending on the decision of the appeals court. If the government wins in the appeals court, then the step four decision to seek certiorari is undertaken by the private party. If the private party wins at step three, then the government must decide whether to appeal to the Supreme Court. The Supreme Court then has the two final moves. In step five, it decides whether to grant certiorari. We call the cases on the left branch "cert affirm cases," as certiorari is granted to a case where an appeals court affirmed the government. The cases on the right branch are "cert reverse cases," where the private party prevailed in the court of appeals. If certiorari is granted, then in step six the Supreme Court decides either to uphold the government or to reverse it.

The first problem in unpacking Supreme Court decisions is to determine likely changes in the Court's caseload. To predict how the cases change, we initially impose two assumptions which are relaxed in the subsequent discussion. First, suppose that the courts of appeals are fully faithful to the rule of law, that is, that they want to decide cases in complete accord with Supreme Court directions. Second, assume that the Supreme Court can issue an unambiguous signal, which is observed by all of the relevant parties in administrative cases and appeals.

A central result from the economic analysis of suit, settlement, and trial is that cases typically are filed only when the expected benefits—the likelihood of winning times the benefits that result from success—exceed the costs of filing and litigation, and the expected costs of losing. Priest and Klein⁷⁷ argue that civil cases go to trial only when both sides have approximately equal expectations of winning. Otherwise, they would settle and save litigation costs. Thus, whatever standard is applied by the courts, in equilibrium the likelihood of success for both parties is about fifty percent.

The same principle holds for administrative cases, although overall the plaintiffs' likelihood of success is usually less than fifty percent. A lower probability of success is still consistent with a rational pursuit of administrative appeals. The benefits to plaintiffs from winning an administrative appeal can be much greater than the litigation costs or the cost of losing, so winning large benefits with a low probability of success may still exceed expected costs. Furthermore, the plaintiff may benefit directly from initiating a suit, independent of the probability of success. For example, the appeal may delay agency actions or impose large costs on the defendants.

77. George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUD. 1 (1984).

FIGURE 7

**Step 1: Agency
Action**

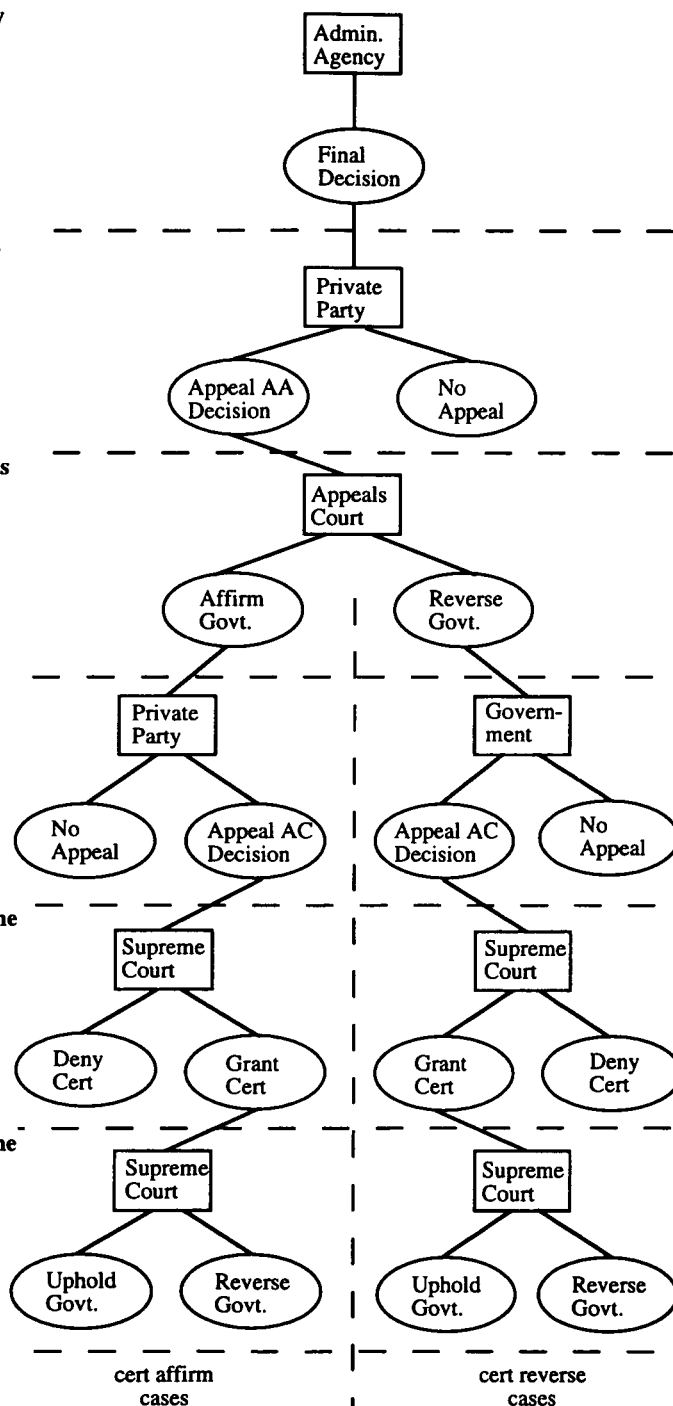
**Step 2: Appeal
for Judicial
Review**

**Step 3: Appeals
Court Decision**

**Step 4: Appeal
for Supreme
Court Review**

**Step 5: Supreme
Court Cert
Decision**

**Step 6: Supreme
Court Decision**



The preceding discussion implies that the actors' decisions in each of the first four steps are based on their expectations about the ultimate outcome of the game. The agency's decision will incorporate a level of discretion that it expects to prevail ultimately. Appeal is undertaken at step two only if the private party believes it has a reasonable chance of success in the courts, which depends on its beliefs about the standard of deference that will be used by the judiciary. Next, the appellate courts issue a decision at step three that reflects their beliefs about Supreme Court preferences. Finally, at step four a certiorari appeal is undertaken only if the government or private party believes its costs and efforts for appeal are justified by the likelihood of success at the Supreme Court. Thus, the cases that are present at each step—and those presented to the Supreme Court for review—reflect the beliefs of each decisionmaker (agency, private party, appeals court, appellant) about Supreme Court preferences, and are expected to change if the Supreme Court announces a new standard of review—for example, in the wake of *Chevron*.

2. *Predicted Courts of Appeals Uphold Rates and Supreme Court Signals.* The process sketched out here has a lagged structure, owing to the timing of decisions and appeals. The lags mean that adjustments take place sequentially; by taking account of the sequencing, the effects of a change in Supreme Court preferences can be inferred to some degree from observing the outcomes of cases rather than analyzing their content. Suppose that *Chevron* does represent a signal from the Supreme Court for greater judicial deference to administrative agencies, as discussed in section II. What should happen to appeals courts' uphold rates under the preceding assumptions?

Chevron should have approximately no impact on appellate uphold rates during the term that the Supreme Court heard *Chevron* ("year 1"), as the Court's decision was announced at the end of the term. During year 1, courts of appeals will base their decisions on the pre-*Chevron* level of deference. Furthermore, in year 1, neither the agency's actions at step one, nor those of the private party at step two will reflect the *Chevron* policy change. Thus, the caseload confronting courts of appeals in year 1 will be identical to the pre-*Chevron* caseload, and their uphold rates in year 1 will be unaffected by the change in policy.

The *Chevron* standard becomes effective in courts of appeals in the subsequent term ("year 2"). Were the caseload identical, one would observe an increase in the appeals courts uphold rate. However, we predict a partial adjustment in the appellate caseload. First, a one-year lag between step one (agency decisions) and step two (judicial appeal) is common, although not universal. Thus, a fairly large share of the potential appeals available to private parties at step two will be based on pre-*Chevron* agency expectations, and will be identical to those of year 1. However, in year 2, the private parties, like the appeals courts, have observed *Chevron*. As a result, plaintiffs in year 2 may choose not to appeal some cases that they would have appealed in year 1. Specifically, at step two, private parties will abandon appeals at a

disproportionately high rate in cases where the agency has exercised a small amount of discretion, thereby increasing the average level of discretion exercised in administrative decisions reviewed by courts of appeals.

We do not expect the year 2 adjustment in courts of appeals' caseloads to be complete. If some of the benefits to filing are independent of the likelihood of success (that is, delaying agency actions), or if plaintiffs expended some of the fixed costs of litigation prior to the announced change in policy at the end of year 1, then some plaintiffs are likely to appeal cases even if they have a very low probability of success. Hence, changes in the appellate caseload will not fully compensate for the change in the deference policy, and courts of appeals' uphold rates are expected to increase from year 1 to year 2.

By the subsequent year ("year 3"), all of the upstream actors will have had time to adjust to the change in the Supreme Court's policy. Agencies will have observed the change in the deference standard at the end of year 1. During year 2, they can be expected to take advantage of their increased latitude. As a result, plaintiffs in year 3 will have as many opportunities to complain about excessive exercise of discretion, relative to the new standard, as they had to complain about in year 1, relative to the initial standard. Thus, the rational adjustment model predicts that courts of appeals uphold rates in year 3 will have declined to the year 1 level.

The final steps in the decision tree present additional challenges to the analysis. The discussion above relates directly to step four: requests for certiorari should follow the same adjustment path. The average level of deference in year 2 certiorari appeals (appeals at step four) is expected to increase, owing to year 2 adjustments in the beliefs of the appellants. But, as with step 2 appeals, the opportunity set of cases that can be appealed (year 1 appellate decisions) is unchanged by *Chevron*. In year 3, cases appealed to the Supreme Court reflect both the change in appellants' expectations and the change in appeals courts' decisions in year 2. Finally, in year 4, the step four appeals reflect full adjustments by all upstream actors. A problem with the analysis, however, is presented by step five: the decision to grant certiorari. While the appeals courts decide all cases presented to them, the Supreme Court grants certiorari to a vanishingly small percentage of appeals. It is at this step that the rational adjustment model loses some of its credibility, and should be replaced by a more specific model that characterizes the conditions under which the Supreme Court grants certiorari. Unfortunately, this exercise is beyond the scope of this article. As a first cut, then, we ignore both step four and step five adjustments, and instead presume that the cases heard by the Supreme Court are representative of the decisions issued by appeals courts in the previous term.

Given this simplification, we can characterize the pattern of signals that the Supreme Court issues to appeals courts—that is, requests for lower courts to grant greater or lesser deference to administrative agencies. The Court requests a change through its treatment of the appellate decisions under review during the current term. In year 1, the Supreme Court issues its first signal for greater deference. In year 2 the Supreme Court reviews appellate decisions from year

1, which are based on pre-*Chevron* cases and a pre-*Chevron* appellate standard of deference. The Supreme Court signal in year 2 should be identical to that of year 1: greater deference relative to the appellate court decisions from year 1. We should therefore expect two consecutive years of greater discretion signals from a single change in the Supreme Court's desired level of allowable agency discretion. If there is no further change in the Supreme Court's preferences, the Supreme Court's signals in years 3 and 4 should be for no change in the level of deference relative to the appellate decisions from years 2 and 3.

We cannot stress strongly enough one central point: *the Supreme Court's signals must be interpreted relative to the caseload in the federal appellate courts.* For example, we stated above that one should expect the courts of appeals' uphold rates to decline in period 3 because of changes in the caseload coming from the administrative agencies. A Court that desired a sustained increase in the acceptable discretion level would request no shift in deference in year 4 when reviewing year 3 cases from the courts of appeals. The superficial appearance—that the Supreme Court was accepting a *decrease* in the acceptable level of agency discretion—is completely misleading.

We started this discussion with two simplifying assumptions: (1) the signal is unambiguous and (2) courts of appeals adjust fully to the new standard. Relaxing these assumptions changes our predictions about signals and the adjustment periods. First, suppose the Supreme Court's signal is somewhat ambiguous. The appellate courts will be unsure of the new standard contained in the Court's ambiguous signal. In response, the courts of appeals may apply a greater deference standard only to cases that closely resemble those granted certiorari. Because certiorari is limited, the Supreme Court may have to hear cases over several years before it supplies a base of rulings broad enough to cover the full range of cases before the appellate courts. As a result, the Supreme Court may continue (ambiguously) to signal greater deference for three or four years, and adjustments in courts of appeals' uphold rates, agency decisions, and appellant decisions will take longer than is described above.

Second, suppose that courts of appeals do not fully adjust their rulings, even if the Supreme Court's signal is unambiguous. If, as we hypothesize in part II, courts of appeals are not fully faithful to the rule of law, they will continue to pursue their own policy preferences in the hope that the Supreme Court will not grant certiorari and reverse. We nevertheless expect the adjustments to resemble those from a completely faithful court of appeals, although with smaller magnitudes. However, when the courts of appeals are reluctant to adhere to the Supreme Court's standard, the Court will continue to signal greater deference relative to the courts of appeals' decisions for more than two years.

3. *The Supreme Court Signal.* We turn next to the nature of the Supreme Court's signal. As discussed above, we can deduce the direction of change that the Court desires by considering together appeals court and Supreme Court actions on each case. We consider only the implications of actions on cases that the Court hears (the step six decision), although denials of certiorari, despite the

protestations of the Court, probably carry information to lower courts, agencies, and appellants as well.

As shown in Figure 7, there are four possible step six actions: upholding or reversing the government on cert affirm cases, and upholding or reversing the government on cert reverse cases. The simplest interpretation—again, a first cut at a methodology—holds that the Supreme Court issues a signal for change only when it reverses the lower courts. Thus, upholding the government on a cert reverse case carries a signal for greater deference, and reversing the government on a cert affirm case signals a preference for a lower level of deference. Both of the other actions signal that the Supreme Court finds the appeals court standard of deference acceptable.

The importance of the selective granting of certiorari now becomes apparent. Suppose the Supreme Court grants certiorari only to cert affirm cases. If the Supreme Court upholds all such cases, it signals that the appeals courts' level of deference is acceptable. Now suppose that in the subsequent year the Supreme Court reviews only cert reverse cases, and that it upholds the government in none of these cases. Because the Court continues to affirm appeals courts in all of its decisions, it is likewise signaling that the lower courts' level of deference is acceptable. *Thus, even though the Supreme Court uphold rate drops from one to zero, it signals the same desired level of deference to agency discretion in year 1 as in year 0.* Now consider the following modification in the second year: the Supreme Court grants certiorari only to cert reverse cases, and it upholds the government (that is, it, reverses the courts of appeals) in twenty percent of the cases. Despite a drop in the uphold rate from one to .20, the Supreme Court would be signaling for an increase in judicial deference. Thus, the Supreme Court uphold rate by itself carries *no* information about a change in its desired standard of deference; however, if we know the action of the appeals court we can determine whether the Court has changed preferences from the previous term, and the direction of the change.

Figure 8 plots courts of appeals' uphold rates on administrative law cases granted certiorari between 1983 and 1990, as well as courts of appeals' uphold rate on all administrative law cases in the previous year.⁷⁸ The Figure indicates that the Supreme Court is not drawing randomly from the appellate caseload, for if that were the case the two lines would roughly coincide. Furthermore, the uphold rate varies from year to year, suggesting that the Supreme Court is strategically granting certiorari.

Figure 9 plots courts of appeals uphold rates on certiorari cases (the cert uphold rate) and the Supreme Court uphold rate on the same caseload. Note that in 1984 the share of cert affirm cases drops from 1983-- that is, the Supreme Court hears more cert reverse cases--while the Court's uphold rate increases.

78. As cases granted certiorari are drawn from the previous year's caseload, the relevant comparison is between cases decided by the appellate court in year $t-1$ and cases granted certiorari in year t .

Taken together, these patterns suggest that the Court is requesting greater deference. In most years, the types of cases and Court uphold rates give an ambiguous picture. For example, in 1989 the Court uphold rate increase, but it heard more cases on which the appeals courts also affirmed the agency.

FIGURE 8

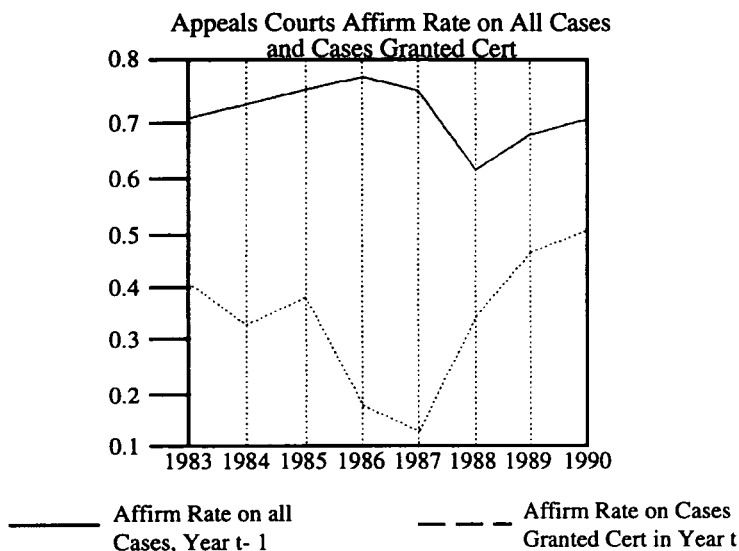
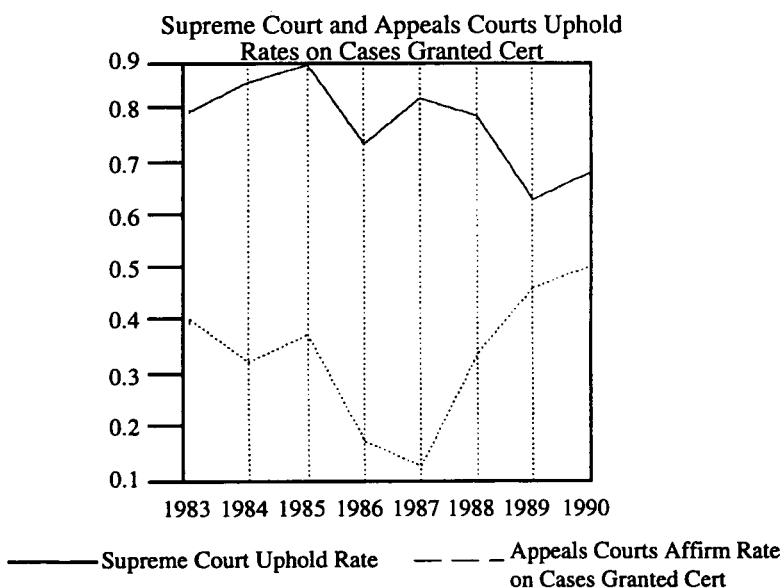


FIGURE 9



To determine the implicit signal in these years requires some method of balancing the four actions at step six (that is, the different Supreme Court decisions). In each year, the Court reviews both cert affirm cases and cert reverse cases, and issues apparently conflicting opinions. Presumably, lower courts and the other actors combine all of the decisions into an overall assessment of the preferences of the Supreme Court. While any specific formula that combines cases is somewhat arbitrary in that it presumes particular weights on the different cases, several principles seem reasonable. These are reflected in the formula and statistical analysis presented below.

First, lower courts presumably balance decisions within the two main categories (cert affirm cases, cert reverse cases). If the Supreme Court upholds the government in most cert reverse cases, it issues multiple decisions for greater deference and few decisions affirming the appeals courts' attempts to rein in the government. The opposite situation holds when the Court reverses the government in most cert affirm cases: in most of the situations reviewed, the Court disagreed with the appeals courts' decisions to grant deference to agencies. In general, the greater share of lower court reversals in each category, the stronger the signal to lower courts to increase or decrease deference.

Second, in balancing the signals for greater and lesser deference, one should take account of the number or share of cases reviewed in each category, and give greater weight accordingly. In part, this principle reflects the importance of certiorari choices by the Supreme Court. The possibility of sending a signal for greater deference exists only when the Court reviews cert reverse cases, while a signal for less deference can be sent only when the Court reviews cert affirm cases. In addition, a better signal is sent when it is based on more decisions, because a greater share of the appellate caseload will be directly comparable to a case granted certiorari.

Third, the signal should allow for different degrees of appellate court independence. When courts of appeals are fully independent, they pay no attention to Supreme Court decisions, whatever they may be, and the signal is ineffective. Presumably, the closer the appeals courts are in policy space to the Supreme Court, the more eager they will be to follow Supreme Court directives.

These principles are reflected in the following formulation of appellate court response to Supreme Court decisions.⁷⁹

Let:

A_{t-1} = the courts of appeals uphold rate in period $t-1$

β_t = share of cases granted cert in period t for which the court of appeals upheld the government (share of cert affirm cases)

U_t = the Supreme Court government uphold rate for cert affirm cases

R_t = the Supreme Court government uphold rate for cert reverse cases

79. Other formulae exist that also take these principles into account. We present this calculation to demonstrate the methodology, and plan to investigate other possibilities in further research. At this point, greater precision in modeling is not justified by the accuracy of the available data. See *infra* part III.B.4. for a further discussion of the data.

α = the court of appeals independence parameter, where $0 \leq \alpha \leq \infty$. Larger values of α correspond to greater court of appeals independence.

A_{t-1}^* = the rate at which the courts of appeals would have upheld the government on the year $t-1$ caseload, had they known in advance the Supreme Court's decisions on cases from year $t-1$ granted cert and decided in year t .

Equation 1 characterizes court of appeals' adjustments to Supreme Court decisions:

$$(1) \quad A_{t-1}^* = A_{t-1}[1 - f(\beta_d)(1 - U_t)e^{-\alpha}] + (1 - A_{t-1})f(1-\beta_d)R_te^{-\alpha}$$

Note in equation 1 that the courts of appeals increase their uphold rates in response to higher Supreme Court uphold rates (U_t and R_t). The independence parameter, α , controls the response to U_t and R_t ; when $\alpha = 0$, response is maximal; when α is infinite, the courts of appeals ignore Supreme Court decisions. Finally, for higher values of $f(\beta_d)$ courts of appeals pay more attention to Supreme Court actions in cert affirm cases, while for higher values of $f(1-\beta_d)$ courts of appeals pay more attention to Supreme Court actions in cert reverse cases. In the calculations we let $f(x) = x^\gamma$. Increasing returns to cert apply when $\gamma > 1$ and decreasing returns to cert exist when $\gamma < 1$. The linear cert model, where $\gamma=0$, assumes that $f(\beta_d) = \beta_d$ and $f(1-\beta_d) = 1-\beta_d$.

Finally, note that in this formulation the signal is independent of possible adjustments in caseload in response to policy changes by the Supreme Court. What A_{t-1}^* measures is the appeals courts' projected uphold rate on the same cases that are under review by the Supreme Court, had they known the Court's decisions in advance. A_{t-1}^* captures the change in the discretionary standard used by courts of appeals after observing the signal (R_t , U_t , β_t) in year t , and is independent of changes in the caseload.

Rearranging equation 1 yields the following equation:

$$(2) \quad (A_{t-1}^* - A_{t-1})e^\alpha = (1 - A_{t-1})f(1 - \beta_d)R_t - A_{t-1}f(\beta_d)(1 - U_t)$$

The right-hand side of equation 2 yields an estimate of Supreme Court signals. That is, by choosing (R_t , U_t , β_t), the Court indicates that it desired appeals courts to uphold the government in year $t-1$ at rate A_{t-1}^* rather than A_{t-1} .

All of the factors on the left hand side of equation 2 can be estimated. α , however, cannot be estimated from the available data, so that we can reach conclusions only about whether A_{t-1}^* is greater or less than A_{t-1} , but not about its magnitude. If it is assumed that α is constant over time, the relative sizes of the signals can be compared; we follow this strategy initially. The final section includes a discussion of appeals courts' policy positions from which we make further inferences about the relative size of the calculated signals.

4. *Our Results on Deference.* One can estimate the implicit Supreme Court shift signal from equation (2). To estimate the signal, one needs data about the annual courts of appeals' affirm rate, the certiorari uphold rate, and the Supreme Court's reversal rate of the appellate courts.

For courts of appeals' affirm rates, this article uses data from the Administrative Office Annual Report of the Judicial Conference. This article also uses the same statistics employed by Schuck and Elliott in their comparison: the ratio of all affirmed administrative cases to all administrative cases decided on the merits. As Schuck and Elliott discuss, this data is far from ideal. Most problematic is that it includes all administrative decisions, rather than just those that address statutory interpretation cases.⁸⁰ Fortunately, our results are relatively insensitive to the precise values used for A_{t-1} , as long as the pattern of affirmances on statutory interpretation cases is similar to that for all administrative cases.

The rest of the data was collected by reading Supreme Court cert cases between 1983 and 1990. In most of the years, the Supreme Court heard about twenty administrative appeals that required a decision on statutory interpretation.

TABLE 7 DATA

year	Appeals Courts Uphold Rate A_{t-1}	Cert Uphold Rate β	Uphold Rate on cert affirm cases U_t	Uphold Rate on cert reverse cases R_t	number
1983	0.70	0.41	0.67	0.85	22
1984	0.72	0.33	0.83	0.83	18
1985	0.74	0.38	0.63	1.00	21
1986	0.76	0.19	0.75	0.71	21
1987	0.75	0.14	1.00	0.77	21
1988	0.61	0.35	1.00	0.64	17
1989	0.67	0.46	0.67	0.57	13
1990	0.70	0.50	0.67	0.67	12

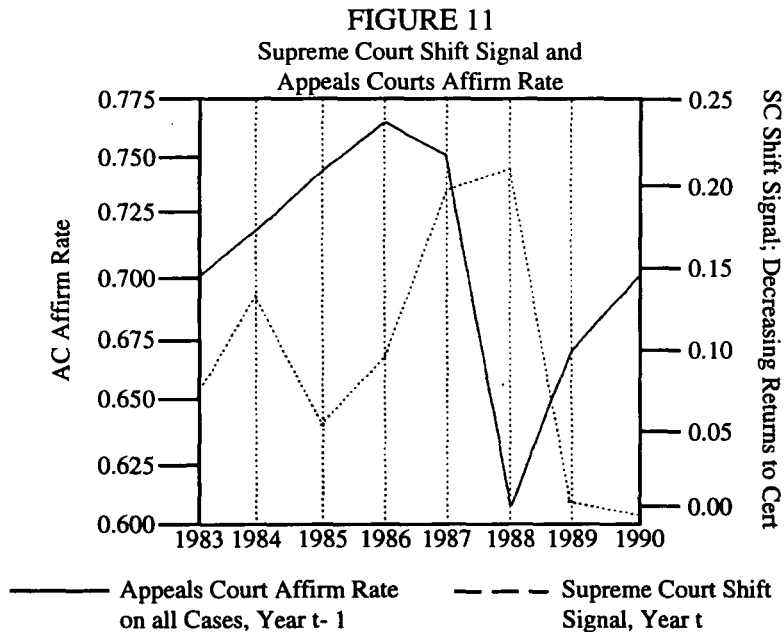
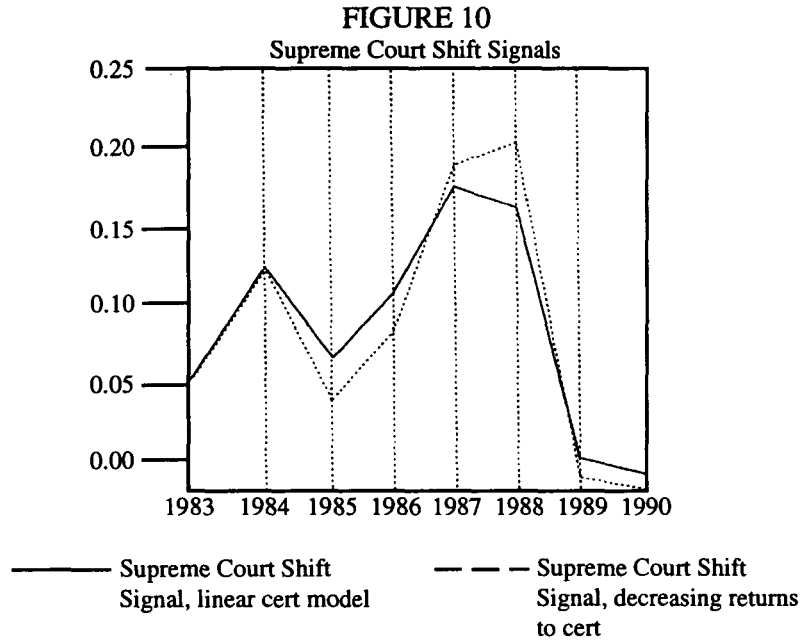
The data contained in Table 7 show that there was a slight increase in the appellate affirm rate in the mid-1980s. The differences in affirm rates are far less dramatic in this study than the differences found by Schuck and Elliot in their study of Federal Reporter Second Series cases, because of the discrepancies in case collection.

The changes in the uphold rate on certiorari cases was dramatic. In the years immediately following *Chevron*, the Supreme Court was reviewing far more cases in which appellate courts reversed the government. The calculations in this article imply that the difference in certiorari cases outweighs the drop in the Supreme Court uphold rate of the government.

Figure 10 plots the implicit shift signal for the years 1983 to 1990, and Figure 11 plots the implicit shift signal and courts of appeals' uphold rates on cases

80. Unfortunately, the data from the Administrative Office for years prior to 1983 seem so untrustworthy as to preclude use.

under review in the same year. For positive values of α , the implicit signal is exaggerated, that is, the magnitude of $(A^*_{t-1} - A_{t-1})$ will be smaller than in the calculations here. However, the pattern of signals here offers a different interpretation of the Supreme Court uphold rates than that concluded by Merrill.



The *Chevron* decision came at the end of 1984. The data suggest that in 1983 the Supreme Court was basically content with the level of discretion used by appellate courts. We calculate a shift signal (multiplied by e^α) of .05 for both cert models. Because of the sample size and α , one can interpret a signal of this size to be about zero. The Supreme Court then signaled a shift to a greater discretion level in the years following the *Chevron* decision, especially 1986-88. The three years of shift may indicate that the Court was moving toward a greater discretionary standard in the years following *Chevron*; alternatively, it may have been consistent with a somewhat longer adjustment period than the minimal two years posited by our model. Thus, the pattern suggests two possibilities, both of which probably apply in these years. First, a longer lag time may be appropriate because of the uncertainty factors discussed above (that is, the signal is somewhat ambiguous); second, because courts of appeals are not fully faithful to the rule of law, they may resist the guidance of the Supreme Court.

In 1989 the Supreme Court signaled that no further shift was desired. The calculated shift rate drops to 0. Finally, in 1990, the Supreme Court signaled a small negative shift. As previously mentioned, these latter years are based on a much smaller number of certiorari cases, and the small magnitudes suggest that little adjustment is desired in the appellate standard of discretion.

These conclusions differ from those of Merrill. Statistically, this article observes no retreat from *Chevron* through 1988. The drop in the Supreme Court uphold rate in 1986-88 is consistent with a sustained shift in its desired deference level. The Supreme Court decisions in 1989 and 1990 *might* have suggested a signal for reduced deference, so that *K Mart Corp. v. Cartier, Inc.*,⁸¹ decided in 1988, may have indeed represented a turning point as Merrill hypothesizes. However, we must emphasize that all of the signals are based on a small number of cases and that our conclusions are accordingly preliminary.

Let us now recast these results in terms of the rational choice explanation of *Chevron*. By the mid-1980s, the Supreme Court and the administrative agencies had moved to a conservative policy position relative to both Congress and the appellate courts. Consequently, agencies could rule in a conservative manner only by exercising greater discretion relative to their statutes, and the Supreme Court could enforce those decisions by tying the hands of the appellate courts by signaling that they should allow agencies greater discretion in interpreting the statutes. Following *Chevron*, continued signals from the Supreme Court in accord with the lags are posited in our model. Furthermore, the appellate uphold rate increases and then declines as the rational equilibrium model of case filings predicts.

Assuming that the negative shift calculated for 1989 and 1990 holds up with more data, and that it continues into 1991 and 1992, the data may further indicate that by the late 1980s, courts of appeals had moved closer to the Supreme Court's policy position. Furthermore, it may indicate that the

81. 486 U.S. 281 (1988).

administrative agencies under President Bush had become more liberal than the best interpretation of statutory language. In this case, one would expect that the Supreme Court would want courts of appeals to take a more active role in binding agencies to statutory language, and hence that the deference level would be reduced.

In conclusion, then, in the late 1980s the Supreme Court was not moving away from *Chevron*, but rather signaling that the current appellate standard for deference was acceptable and that no further shift was needed. Thus, the Supreme Court decisions in the 1980s were consistent with a sustained shift in the Supreme Court's desired level of deference following *Chevron*. The data could also be consistent with some retreat from *Chevron* in 1990.

5. *Measuring Ideal Points?* As we have already indicated, we will do little beyond the impressionistic check of ideal points that were used discursively when setting up the model. In 1981, President Reagan seemed to be much more conservative than ex-President Carter. In 1981 the Senate fell into Republican control, and then in 1986 returned to Democratic control. Hence, a large move right, then left, for *S* seems justified. The House stayed fairly liberal throughout this era. The ideal points of the Justices in the plane necessarily represent a great deal of guesswork. Thus, there is no independent measure of the ideal points along the deference axis. However, during the 1980-85 period there was only one change on the Supreme Court: Sandra Day O'Connor replacing Potter Stewart in 1981. These two probably differed little along the policy axis. If O'Connor and Stewart also occupied similar positions in the deference dimension, using the same Justices—1, 2, and 3 might be acceptable. President Reagan appointed two more Justices to the Supreme Court. In 1986, Antonin Scalia replaced Warren Burger. In 1988, Anthony Kennedy replaced Lewis Powell. Each of these new Justices probably represented a significant move to the right along the policy axis; each would seem to have an incentive to give agencies deference in order to gain more conservative policies *if* each also preferred that agencies, rather than courts, interpret statutes. In 1989, David Souter replaced William Brennan, again probably best represented by a large move to the right.

We have attempted to quantify the location of courts of appeals on the policy axis. For each year from 1977 to 1992, we coded all of the judges on the U.S. courts of appeals according to the political party of the nominating president and the majority party of the confirming Senate. Thus, there are four possible codings for each judge: Democratic president and Democratic Senate ("DD"), Democratic president and Republican Senate ("DR"), Republican president and Democratic Senate ("RD"), and Republican president and Republican Senate ("RR"). Within each period we divided each group into active and senior status ("SS"). Then, for each year, we calculated an index of average ideology for courts of appeals, using the following formula:

$$(0(\text{number active } DD + (.5)\text{number } SS \text{ } DD) + .7(\text{number active } RD + (.5)\text{number } SS \text{ } RD) + (\text{number active } RR + .5(\text{number } SS \text{ } RR))/((\text{number active } DD+RD+RR)+(.5)(\text{number } SS \text{ } DD + SS \text{ } RD + SS \text{ } RR))$$

This formula presumes several things. First, the president gets seventy percent of the surplus in a bargaining game with the Senate of the opposite party. Second, the party of the president and the Senate, rather than the party of the nominee, predict the judge's ideology. Third, once one knows the party of the president and the Senate one has as much information as one needs to describe ideologies. In addition, the formula neglects institutional structures. In the judiciary, the majority rule nature of panels and the methods of choosing panels should be modeled,⁸² and in the Senate, the committee system should be included.⁸³ Nevertheless, the formula gives a reasonable approximation of what one should expect from courts of appeals. The calculations produced the following results:

TABLE 8
CALCULATIONS

Year	DD		RD		RR		Ideology Index
	Act	SS	Act	SS	Act	SS	
1977	44	20	50	22	0	5	.38
1978	45	17	50	19	0	5	.38
1979	70	18	48	17	0	3	.30
1980	73	20	47	21	0	4	.30
1981	76	23	43	22	1	3	.28
1982	79	26	42	25	17	4	.35
1983	76	28	40	24	22	4	.36
1984	78	23	36	22	33	4	.40
1985	70	27	32	26	41	4	.43
1986	67	30	28	27	60	6	.49
1987	63	34	32	30	61	6	.51
1988	65	26	39	28	61	5	.52
1989	56	34	38	31	59	7	.53
1990	50	35	49	31	58	4	.55
1991	47	40	53	31	55	7	.55
1992	43	37	59	33	54	8	.57

Courts of appeals drifted to the left during the Carter Administration, but they have since that time moved consistently to the right. The movement,

82. There is probably little systematic ideological bias in assigning cases to panels of judges; thus, the method used here of computing the average ideological index is most likely accurate. One could compute the probabilities of obtaining a three judge panel on which the median voter was *DD* or *DR* or *RR*, and then multiply the three probabilities by 0, .7, and 1 to get a better index. We leave this as an exercise for the interested reader. Hint: when computing the probabilities, be sure to count *SS* judges as only half as likely *ex ante*.

83. For a discussion on the extent to which the majority party controls the committee system, see GARY COX & MATHEW MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (1993).

however, was fairly slow. It was not until 1986 or 1987 that the average federal appellate judge could be considered "middle of the road" on the U.S. political highway. This fits reasonably well with the rational choice explanation of *Chevron*. Courts of appeals moved to the right of the Best Statutory Interpretation, and the occasional forays into setting policy were in a conservative direction. Such a situation probably pleased the increasingly conservative Supreme Court Justices, who may have in turn reacted by signaling a small decrease in deference to administrative agencies by about 1989. The data on the Supreme Court's shift signals are consistent with such a story.

6. *Other Models and the Data.* How do the other two explanations stack up against the data? Explaining *Chevron* as a manifestation of the Justices' genuine preferences about relations between the federal courts and the administrative agencies fits with the data. If all of the Justices suddenly realized at the end of 1984 that the federal courts really ought, either as a matter of democratic theory or as a matter of respect for agency expertise, to defer to administrative statutory interpretations, then one would expect to see a fairly sustained signal from the Supreme Court to courts of appeals for more deference. The analysis of lags between the Supreme Court's first signal and the point where the administrative cases had changed character and finally worked their way through the system to the Supreme Court would be left unchanged. Hence, this explanation *could* work.

This sort of explanation lacks power and strains credulity. It lacks power because it offers no way of dealing with conflicting opinions such as *Chevron* and *Cardoza-Fonseca*. It also lacks power because it cannot predict changes unless augmented by a method of predicting when Justices will change their minds. In short, this explanation strains credulity because the assumption that Justices care *only* about process, and not about policy, seems so unlikely.

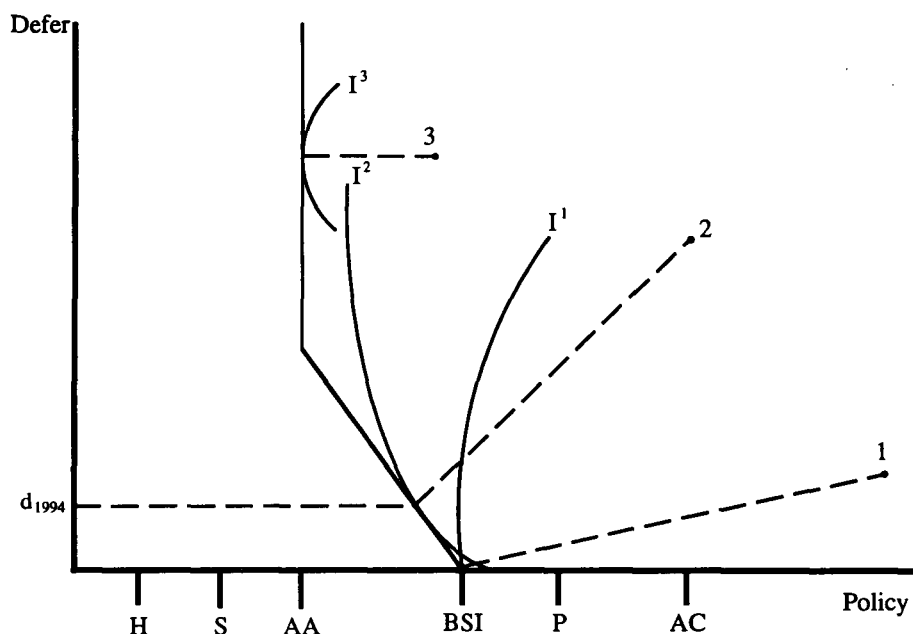
The logrolling model does about as well with the data as the above explanation. If one were to think that somewhere in 1984 the Justices suddenly decided to trade votes on some cases that would explain the data. However, the logrolling model's defects have already been outlined, and nothing in the data can fix them. There is no natural tripartite division of administrative agencies that would produce the unanimous vote in *Chevron*. In addition, it would be difficult to enforce the logroll.⁸⁴

7. *Predictions.* In the Clinton Presidency, one would expect administrative agencies to move significantly to the left, so that agency ideal points are to the left of the *BSI* point. But the majority of Justices and judges on both the Supreme Court and courts of appeals will probably remain conservative; it will take a while for Clinton's appointments to move these two institutions. Assuming that the Justices on the Supreme Court are not so enamored of

84. See *supra* text accompanying notes 44-45.

deference that it swamps their preferences for conservative policy outcomes, the Supreme Court will most likely signal courts of appeals to give less deference to administrative agencies. This situation is pictured in Figure 11.

FIGURE 12



IV

CONCLUSION

Eskridge and Ferejohn, Schuck and Elliott, and Merrill have all advanced our understanding of the *Chevron* decision. Eskridge and Ferejohn's models of the interaction within the administrative state highlight the changes wrought by the introduction of powerful administrative agencies. Their models also correctly emphasize the role of judicial review in the article I, section 7 game. This article has attempted to extend their analysis to answer the puzzle of why a rational Supreme Court would adopt such a rule. The best explanation centers on the Supreme Court Justices' preferences for both administrative procedures *and* policy outcomes, as well as the Court's need to deal with the many lower federal courts in a world of scarce resources. These forces combine to explain the unanimous opinion in *Chevron*. Schuck and Elliott provided an extensive data base that gave the first view of the facts of administrative adjudication. Merrill's data provided the first look at Supreme Court decisionmaking before and after

Chevron. But their data left several puzzles unsolved. This article solved a couple of them by testing a more sophisticated model of *Chevron* by accounting for the signaling function of Supreme Court opinions. The results were consistent with the rational choice explanation of *Chevron* as a method for controlling the behavior of the appellate courts.